S[illegible]me Court, U.S.
FILED

No. 08-___

081315 APR 22 2009

IN THE

OFFICE OF THE CLERK

Supreme Court of the United States

PHARMACIA CORPORATION, PFIZER, INC., FRED HASSAN, DR. G. STEVEN GEIS AND CARRIE COX,
Petitioners,

v.

ALASKA ELECTRICAL PENSION FUND, CITY OF SARASOTA FIREFIGHTERS' PENSION FUND, INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 132 PENSION PLAN, NEW ENGLAND HEALTH CARE EMPLOYEES PENSION FUND, PACE INDUSTRY UNION-MANAGEMENT PENSION FUND AND CHEMICAL VALLEY PENSION FUND OF WEST VIRGINIA, AS CLASS REPRESENTATIVES, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITION FOR A WRIT OF CERTIORARI

WILLIAM A. DREIER
STEVEN A. KARG
NORRIS, MCLAUGHLIN & MARCUS, P.A.
P.O. Box 1018
721 Route 202-206
Somerville, New Jersey 08876
(908) 722-0700

DENNIS J. BLOCK
Counsel of Record
JONATHAN M. HOFF
JOSHUA R. WEISS
CADWALADER, WICKERSHAM & TAFT LLP
One World Financial Center
New York, New York 10281
(212) 504-6000

Counsel for Petitioners

April 22, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Did the Third Circuit err with respect to the following questions concerning the statute of limitations for a claim under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"):

a. Under what circumstances is the "inquiry notice" standard triggered by the existence of "storm warnings" that would cause a reasonable investor to investigate his or her claims?

b. Do "storm warnings" exist when the plaintiff is on notice of facts contradicting the defendant's allegedly false statements?

c. Is a plaintiff on "inquiry notice," and does the limitations period begin to run only when the plaintiff becomes aware, without conducting an investigation, of evidence supporting each element of its claim, including evidence of the defendant's fraudulent intent?

2. Did the Third Circuit err in holding that the complaint adequately pleads scienter for purposes of a claim under Section 10(b) of the Exchange Act where the Third Circuit failed to engage in any analysis of the plaintiff's scienter allegations, let alone the analysis required by this Court in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007)?

RULE 14.1(b) STATEMENT

The Petitioners, Defendants-Appellees below, are Pharmacia Corporation, Pfizer, Inc., Fred Hassan, Dr. G. Steven Geis and Carrie Cox.

The Respondents, Plaintiffs-Appellants below, are Plaintiffs Alaska Electrical Pension Fund, City of Sarasota Firefighters' Pension Fund, International Union of Operating Engineers Local 132 Pension Plan, New England Health Care Employees Pension Fund, Pace University Union-Management Pension Fund, and Chemical Valley Pension Fund of West Virginia, purporting to act on behalf of themselves and all others similarly situated.

RULE 29.6 STATEMENT

Petitioner Pfizer, Inc., states that it has no parent corporation, that no publicly held corporation owns more than 10% of its stock and that it owns 100% of the stock of Petitioner Pharmacia Corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 14.1(b) STATEMENT	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
STATUTORY PROVISIONS	2
INTRODUCTION	3
STATEMENT	7
A. Respondents' Suit	10
B. The District Court Denies Petitioners' Motion To Dismiss	11
C. The District Court Grants Petitioners' Summary Judgment Motion	11
D. The Third Circuit Reverses	12
REASONS FOR GRANTING THE WRIT	13
I. THERE IS A SUBSTANTIAL SPLIT OF AUTHORITY CONCERNING THE COMMENCEMENT OF THE LIMITATIONS PERIOD FOR A SECTION 10(b) CLAIM	13
A. The Third And Ninth Circuits Exacerbate The Split Of Authority With Respect To The Inquiry Notice Standard	15

TABLE OF CONTENTS—Continued

Page

B. The Opinion Below Further Exacerbated The Split Of Authority Regarding "Inquiry Notice" 18

II. THE THIRD CIRCUIT'S OPINION CONFLICTS WITH PRECEDENT OF THIS COURT BECAUSE IT DID NOT ADDRESS THE ANALYSIS MANDATED BY *TELLABS* 28

CONCLUSION 35

APPENDICES

APPENDIX A – Third Circuit Opinion, filed January 30, 2009 ..... 1a

APPENDIX B – Third Circuit Order, filed March 3, 2009 ..... 22a

APPENDIX C – District Court Order, filed October 30, 2007 ..... 24a

APPENDIX D – District Court Order, filed May 20, 2004 ..... 37a

APPENDIX E – 15 U.S.C. § 78u-4(b)(2) 39a

APPENDIX F – 28 U.S.C. § 1658(b) 40a

TABLE OF AUTHORITIES

CASES — Page

Basic Inc. v. Levinson, 485 U.S. 224 (1988) 25

Benak ex rel. Alliance Premier Growth Fund v. Alliance Capital Mgmt., LP, 435 F.3d 396 (3d Cir. 2006) 17

Betz v. Trainer Wortham & Co., 519 F.3d 863 (9th Cir.), *pet. for cert. filed*, 76 U.S.L.W. 3646 (U.S. May 27, 2008) (No. 07-1489) ..... *passim*

Bodenhamer v. Shearson Lehman Hutton, Inc., 998 F.2d 1013 (TABLE), 1993 WL 277033 (TEXT IN WESTLAW) (5th Cir. 1993) 14

Brumbaugh v. Princeton Partners, 985 F.2d 157 (4th Cir. 1993) 17, 20

Caprin v. Simon Transp. Servs., Inc., 99 Fed. Appx. 150 (10th Cir. 2004) 26

Caspari v. Bohlen, 510 U.S. 383 (1994) 29

Cetel v. Kirwan Fin. Grp., Inc., 460 F.3d 494 (3d Cir. 2006) 24-25

Cook v. Avien, Inc., 573 F.2d 685 (1st Cir. 1978) 13, 15

DeBenedictis v. Merrill Lynch & Co., 492 F.3d 209 (3d Cir. 2007) 17

DiLeo v. Ernst & Young, 901 F.2d 624 (7th Cir. 1990) 33

Eckstein v. Balcor Film Investors, 8 F.3d 1121 (7th Cir. 1993) 25

Franze v. Equitable Assur., 296 F.3d 1250 (11th Cir. 2002) 14

Fujisawa Pharm. Co. v. Kapoor, 115 F.3d 1332 (7th Cir. 1997) 14, 15, 23

TABLE OF AUTHORITIES—Continued

Page

GO Computer, Inc. v. Microsoft Corp., 508 F.3d 170 (4th Cir. 2007)....14, 15, 24
Great Rivers Coop. of S.E. Iowa v. Farmland Indus., Inc., 120 F.3d 893 (8th Cir. 1997)....13, 14, 15
Greenhouse v. MCG Capital Corp., 392 F.3d 650 (4th Cir. 2004).... 25
Horn v. Banks, 536 U.S. 266 (2002).... 29
Howard v. Haddad, 962 F.2d 328 (4th Cir. 1992).... 13
In re Biogen Sec. Litig., 179 F.R.D. 25 (D. Mass. 1997).... 34
In re MedImmune, Inc. Sec. Litig., 873 F. Supp. 953 (D. Md. 1995).... 34
In re Merck & Co. Sec. Litig., 432 F.3d 261 (3d Cir. 2005).... 26
In re Merck & Co. Sec., Deriv. & "ERISA" Litig., 543 F.3d 150 (3d Cir. 2008), *pet. for cert. filed*, 77 U.S.L.W. 3437 (U.S. Jan. 15, 2009) (No. 08-905)....*passim*
In re NAHC, Inc. Sec. Litig., 306 F.3d 1314 (3d Cir. 2002).... 13, 17
Jensen v. Snellings, 841 F.2d 600 (5th Cir. 1988).... 13, 14
Kauthar SDN BHD v. Sternberg, 149 F.3d 659 (7th Cir. 1998).... 13
Kennedy v. Josephthal & Co., 814 F.2d 798 (5th Cir. 1987).... 15
Lambert v. Wicklund, 520 U.S. 292 (1997).... 29
Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991).... 3

TABLE OF AUTHORITIES—Continued

Page

LC Capital Partners, LP v. Frontier Ins. Grp., Inc., 318 F.3d 148 (2d Cir. 2003)..... 13, 14-15
Maldonado v. Dominguez, 137 F.3d 1 (1st Cir. 1998)..... 32
Mathews v. Kidder, Peabody & Co., 260 F.3d 239 (3d Cir. 2001)..... 17
Melder v. Morris, 27 F.3d 1097 (5th Cir. 1994)..... 33
New Eng. Health Care Empls. Pension Fund v. Ernst & Young, LLP, 336 F.3d 495 (6th Cir. 2003).....*passim*
Newman v. Warnaco Grp., Inc., 335 F.3d 187 (2d Cir. 2003)..... 16
Padnes v. Scios Nova, Inc., No. C 95-1963-MHP, 1996 WL 539711 (N.D. Cal. Sept. 18, 1996)..... 34
Rosenbloom v. Adams, Scott & Conway, Inc., 552 F.2d 1336 (9th Cir. 1977) 32
Ross v. Bank S., N.A., 885 F.2d 723 (11th Cir. 1989)..... 24
Schneider v. Vennard (In re Apple Computer Sec. Litig.), 886 F.2d 1109 (9th Cir. 1989)..... 25
Sterlin v. Biomune Sys., 154 F.3d 1191 (10th Cir. 1998).....*passim*
Teague v. Lane, 489 U.S. 288 (1989) 29
Tellabs, Inc. v. Makor Issues & Rts., Ltd., 127 S. Ct. 2499 (2007).....6, 29, 30
Tello v. Dean Witter Reynolds, Inc., 494 F.3d 956 (11th Cir. 2007)..... 15
Theoharous v. Fong, 256 F.3d 1219 (11th Cir. 2001)..... 13, 16

TABLE OF AUTHORITIES—Continued

Page

Tregenza v. Great Am. Commc'ns Co., 12 F.3d 717 (7th Cir. 1993) 23-24
United States v. Armstrong, 517 U.S. 456 (1996) 29
United States v. Bass, 536 U.S. 862 (2002) 29
Whirlpool Fin. Corp. v. GN Holdings, Inc., 67 F.3d 605 (7th Cir. 1995) 15
Wieglos Commonwealth Edison Co., 892 F.2d 509 (7th Cir. 1989) 25
Winer Family Trust v. Queen, 503 F.3d 319 (3d Cir. 2007) 32
Young v. Lepone, 305 F.3d 1 (1st Cir. 2002) 14, 26

STATUTES

15 U.S.C. § 78u-4(b)(2) 2-3, 29
28 U.S.C. § 1658(b) ..... *passim*

OTHER AUTHORITIES

Petition for a Writ of Certiorari, *Merck & Co. v. Reynolds*, No. 08-905 (U.S. Jan. 15, 2009) 5
Petition for a Writ of Certiorari, *Trainer Wortham & Co. v. Betz*, No. 07-1489 (U.S. May 27, 2008) 5

IN THE

Supreme Court of the United States

No. 08-___

PHARMACIA CORPORATION, PFIZER, INC., FRED HASSAN, DR. G. STEVEN GEIS AND CARRIE COX,
Petitioners,

v.

ALASKA ELECTRICAL PENSION FUND, CITY OF SARASOTA FIREFIGHTERS' PENSION FUND, INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 132 PENSION PLAN, NEW ENGLAND HEALTH CARE EMPLOYEES PENSION FUND, PACE INDUSTRY UNION-MANAGEMENT PENSION FUND AND CHEMICAL VALLEY PENSION FUND OF WEST VIRGINIA, AS CLASS REPRESENTATIVES, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at *Alaska Electrical Pension Fund v. Pharmacia Corp.*, 554 F.3d 342 (3d Cir. 2009) (the "Opinion") (reprinted in the Appendix

("App.") hereto at App. 1a). The Order denying Petitioners' motion for rehearing *en banc* is not reported (App. 22a). The opinion of the United States District Court, District of New Jersey, is reported at 2007 WL 3231791 (D.N.J. Oct. 30, 2007) (App. 24a).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 2009. The order denying Petitioners' motion for rehearing *en banc* was entered on March 3, 2009. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The first question presented by this petition involves 28 U.S.C. § 1658, which provides in relevant part:

> (b) [A] private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(47)), may be brought not later than the earlier of – (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation.

28 U.S.C. § 1658(b).

The second question presented by this petition involves 15 U.S.C. § 78u-4(b) of the Private Securities Litigation Reform Act ("PSLRA"), which provides:

> (2) In any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint

> shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

15 U.S.C. § 78u-4(b)(2).

INTRODUCTION

This case presents the significant questions of (1) when the limitations period begins to run on a federal securities fraud claim, including the standard for determining "inquiry notice," and (2) whether federal courts must undertake the analysis mandated by this Court in *Tellabs* to assess the sufficiency of a complaint's scienter allegations in an action brought under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act").

Following this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), and the enactment of 28 U.S.C. § 1658(b), a plaintiff is required to commence an action under Section 10(b) of the Exchange Act within either "(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation," whichever date is earliest. 28 U.S.C. § 1658(b). The Courts of Appeals generally agree that the limitations period begins to runs when the plaintiff either is on "inquiry notice" or "actual notice" of its claim. However, the Courts of Appeals are divided with respect to when "inquiry notice" exists and how "inquiry notice" is determined. Until recently, the Courts of Appeals generally analyzed the statute of limitations inquiry on the basis of when the plaintiff became aware of facts suggesting the possibility of fraud, that is, when the plaintiff became aware of facts contradicting the defendant's prior statements.

These facts are commonly referred to as "storm warnings." Certain Courts of Appeals hold that a plaintiff is on "inquiry notice," thus triggering the limitations period, when the plaintiff becomes aware of facts constituting "storm warnings." Other Courts of Appeals hold that the existence of "storm warnings" obligates the plaintiff to undertake a diligent investigation to ascertain its claims. If the plaintiff does not undertake a diligent investigation, the statute of limitations begins to run from the time the "storm warnings" occur. Still other Courts of Appeals hold that the existence of "storm warnings" does not obligate the plaintiff to investigate, but that the limitations period runs when the plaintiff would have uncovered facts supporting a claim had it undertaken an investigation in response to the "storm warnings".

In 2008, in *Betz v. Trainer Wortham & Co.*, 519 F.3d 863 (9th Cir.), *pet. for cert. filed*, 76 U.S.L.W. 3646 (U.S. May 27, 2008) (No. 07-1489), and in *In re Merck & Co. Securities, Derivative & "ERISA" Litigation*, 543 F.3d 150 (3d Cir. 2008), *pet. for cert. filed*, 77 U.S.L.W. 3437 (U.S. Jan. 15, 2009) (No. 08-905), the Ninth and Third Circuits, respectively, adopted an entirely different approach to the statute of limitations analysis. Those cases held that "storm warnings" do not exist – and, thus, "inquiry notice" cannot be triggered – until the plaintiff, without having undertaken any investigation, becomes aware of evidence supporting each element of its claim. The approach taken by these Courts contravenes, indeed ignores, the fundamental purpose of "inquiry notice" – to encourage the timely filing of securities fraud claims by requiring plaintiffs to use reasonable diligence in determining the existence of their claims – and is directly at odds with the "inquiry notice" standards in the other Circuits.

In its Opinion in the instant action, the Third Circuit purported to reaffirm its holding in *Merck*, but further exacerbated the split among the circuits. The Third Circuit held that the public disclosure of facts directly contradicting a defendant's allegedly false statements are not "storm warnings" suggesting the possibility of fraud which trigger a plaintiff's duty to investigate its claims. The Third Circuit further held that "storm warnings" only exist where a defendant is publicly accused of acting with fraudulent intent or publicly admits that it acted with fraudulent intent. Thus, the Opinion effectively eliminated the "inquiry notice" standard in favor of an "actual notice" standard, and, accordingly, eviscerated the application of the two-year limitations period in 28 U.S.C. § 1658(b). In so doing, the Third Circuit also disregarded federal securities law doctrines established by this Court and contradicted federal securities law principles adopted by other Courts of Appeals.

As discussed in the petitions for *certiorari* filed in *Betz* and *Merck*,[1] this split of authority among the circuits results in circumstances where the same federal securities fraud claim will be allowed to proceed in some circuits, and will be time-barred in others. The existence of different "inquiry notice" standards thwarts Congress's intent, confirmed in *Lampf*, to establish a uniform national standard governing the statute of limitations for federal securities fraud claims. The split will continue to cause the inconsistent application of federal law to the same statutory

---

[1] *See* Petition for a Writ of Certiorari, *Trainer Wortham & Co. v. Betz*, No. 07-1489 (U.S. May 27, 2008); Petition for a Writ of Certiorari, *Merck & Co. v. Reynolds*, No. 08-905 (U.S. Jan. 15, 2009).

claims, encourage plaintiffs to forum-shop and create substantial uncertainty for litigants. Accordingly, this Court should grant Petitioners' petition for a writ of certiorari and resolve this split of authority.

The Third Circuit also erred in holding that the complaint adequately pled scienter. In *Tellabs*, this Court held that "to determine whether a complaint's scienter allegations [in a Section 10(b) action] can survive threshold inspection for sufficiency, a court governed by § 21D(b)(2) [of the PSLRA] must engage in a comparative evaluation; it must consider, not only inferences urged by the plaintiff... but also competing inferences [of non-fraudulent intent] rationally drawn from the facts alleged," and that "[t]o qualify as 'strong' within the intendment of § 21D(b)(2)... an inference of scienter must be more than merely plausible or reasonable – it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 127 S. Ct. 2499, 2504-05 (2007).

In its Opinion, the Third Circuit affirmed the District Court's Order denying Petitioners' motion to dismiss, but, like the District Court, did not engage in any analysis of the complaint's scienter allegations, let alone the analysis required by *Tellabs*. Had the Third Circuit done so, it necessarily would have concluded that the inferences in the complaint of nonfraudulent intent overwhelm any inferences of fraudulent intent. Indeed, had the Third Circuit conducted an appropriate analysis of the Respondents' scienter allegations, it would have concluded that the complaint sets forth no allegations of Petitioners' fraudulent intent, but, rather, only allegations that are routinely held to be insufficient to raise a strong inference of scienter as required by the PSLRA.

STATEMENT

Celebrex is a non-steroidal anti-inflammatory drug ("NSAID") developed by Pharmacia and is used primarily to alleviate pain and inflammation caused by arthritis. In April 2000, Pharmacia publicly disclosed the results of a clinical drug trial called the "Celebrex Long Term Arthritis Safety Study," ("CLASS"). CLASS was designed to assess the gastrointestinal ("GI") safety profile of Celebrex so that Pharmacia could petition the Food and Drug Administration ("FDA") for a favorable change in the warning label for Celebrex. Pharmacia disclosed that Celebrex failed to meet the objectives of the original CLASS protocol. *See* JA:0086-88 (analyst report stating that "[f]or the endpoint 'ulcers and complications'... Celebrex was statistically superior....However for the higher hurdle, 'complications' only, Celebrex... miss[ed] statistical significance....Unfortunately, this was the pre-determined 'primary endpoint' of the trial").[2] Pharmacia stated, however, that the data nevertheless suggested the possible superiority of Celebrex over traditional NSAIDs. JA:0050-55 (at 0050).

In June 2000, Pharmacia submitted a "Briefing Document" to an advisory committee of independent experts appointed by the FDA (the "FDA Advisory Committee" or "Committee"). JA:0354-456. The Briefing Document contained the complete CLASS data and set forth, among other things, (1) an analysis based upon data from the entire study period and pursuant to the original study protocol and (2) an alternative analysis based upon six months of data

---

[2] "JA:___" refers to the Joint Appendix that was filed by the parties in the Third Circuit.

and a different set of GI safety criteria than had been specified in the original study protocol (the "Alternative Analysis"). *Id.*

In September 2000, Petitioner Geis and 15 other doctors and scientists not employed by Pharmacia published an article regarding the results of CLASS in the Journal of the American Medical Association (the "JAMA Article"). JA:0039-47. The JAMA Article acknowledged that Celebrex failed to demonstrate statistically significant superiority based on the criteria prescribed in the original CLASS protocol. Based upon Pharmacia's Alternative Analysis, however, the JAMA Article concluded that "[t]he study determined that [Celebrex] when used for 6 months...is associated with lower incidence of combined clinical upper GI events than Comparator NSAIDs...." JA:0045-46.

In February 2001, the FDA posted to its website the Briefing Document as well as reports by three FDA staff members who analyzed CLASS data from the entire study period (together with the Briefing Document, the "FDA Disclosures"). JA:0354-679. It is undisputed that the FDA Disclosures made clear that (i) CLASS lasted longer than 6 months, (ii) the original study protocol did not include certain GI events that were used in Pharmacia's Alternative Analysis and, (iii) when analyzed according to the original protocol, there was no statistically significant difference between Celebrex and the comparator NSAIDs. The FDA staff members disagreed with Pharmacia's Alternative Analysis (which was set forth in the JAMA Article and Briefing Document), calling it "not valid" and "not convincing" and opining that "the most critically relevant analysis covers the complete study period as specified in the original

protocol." JA:0658-79 (at 0665-66); JA:0459-552 (at 0472, 0482); JA:0555-654 (at 0637-38). One FDA staffer's report stated that "after the study ended the sponsor added a new set of analyses that was based on the first six months of study instead of the entire study period," and opined that Pharmacia "has not adequately justified the value of an analysis limited to 6-month data nor adequately justified replacing the original analysis with this post-hoc analysis." JA:0481. The FDA Advisory Committee also held a public hearing on February 7, 2001, during which the Advisory Committee criticized and rejected Pharmacia's Alternative Analysis. At the hearing, the Committee recommended that the FDA not modify the Celebrex warning label. *See* JA:0980-1214 (at 1213); JA:1516.

The conclusions and criticisms in the FDA Disclosures, as well as the FDA Advisory Committee's recommendations, were published on the FDA's public website and were widely reported by securities analysts and the media. JA:1494-574. For example, in a February 7, 2001 report, J.P. Morgan Securities stated that, according to the FDA reviewers, "Pharmacia's analysis of data at only the 26 week [6 month] time point, rather than the 52 week time point, is unjustified and invalid." JA:0713-16 (at 0714). The same report noted that "[b]oth the Gastrointestinal Reviewer and the Statistical Reviewer so strongly disagreed with Pharmacia's analysis of the data at the 26 week time point that both specifically did not discuss or treat those results, focusing instead their entire discussion on the end-of-study data," and summarized in detail the FDA staff members' reasons for rejecting the Alternative Analysis. JA:0715. According to Respondents' expert affidavit, Pharmacia's stock price declined by a

statistically significant amount on February 7 and 8, 2001, following the FDA Disclosures. JA:1281-450 (at 1301).

In August 2001, the Washington Post published another article based on the February 2001 FDA Disclosures. JA:0203-04. That article asserted that Petitioners "had withheld the full CLASS study data from JAMA;" that JAMA editors felt "disheartened;" and that Dr. Michael Wolfe, a member of the FDA Advisory Committee, was "flabbergasted" upon learning in February 2001 that CLASS lasted longer than six months. JA:0203. There was no reaction in Pharmacia's stock price on August 6, 2001, the first trading day after publication of the Washington Post article; on August 7, 2001, Pharmacia's stock price actually increased. JA:0917.

On June 7, 2002, notwithstanding the Committee's recommendation, the FDA announced that it had approved a label change for Celebrex to include CLASS data based on an analysis not pre-specified in the original protocol, instead using GI safety criteria similar to Pharmacia's Alternative Analysis, but only 9 months of data. JA:0212-13; JA:1602-25.

A. Respondents' Suit

On April 7, 2003, Respondents commenced this action asserting violations of Section 10(b) and 20(a) of the Exchange Act. Respondents alleged that Petitioners made false and misleading claims regarding the results of CLASS in press releases and the JAMA Article. Respondents complained that the JAMA Article was misleading because it was based on only 6 months' data from a 13 month study and used GI safety criteria that differed from those set forth in the original study protocol. Respondents'

complaint was based on facts that were disclosed to the market on the FDA website and in numerous media articles and analyst reports in February 2001, more than two years before the complaint was filed. It is undisputed that Respondents never conducted an investigation of their claims. JA:0243 ¶ 5.

B. The District Court Denies Petitioners' Motion To Dismiss

On December 22, 2003, Petitioners moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) arguing, among other things, that the complaint failed to adequately plead scienter, an essential element of a claim under Section 10(b). By Order dated May 19, 2004, the District Court, without any analysis, denied Petitioners' motion to dismiss. On appeal, Petitioners argued that the District Court erred in denying Petitioners' motion to dismiss because, among other things, Respondents' allegations of an "inference of scienter" were not as cogent or compelling as any competing inferences of non-fraudulent intent as required under *Tellabs*.

C. The District Court Grants Petitioners' Summary Judgment Motion

In May 2007, Petitioners moved for summary judgment, pursuant to Fed. R. Civ. P. 56, arguing, in part, that Respondents' complaint was time-barred because Respondents did not commence their action within two years of the date they were on "inquiry notice" of their claims. 28 U.S.C. § 1658(b). The District Court determined that information posted on the FDA website and widely reported in the media and in analyst reports in February 2001 contradicted Petitioners' alleged misrepresentations about the CLASS results and, as such, constituted "storm warn-

ings" that triggered Respondents' duty to investigate. The District Court also found that Respondents conducted no investigation of the "storm warnings" and that Respondents did not file their complaint until April 7, 2003, more than two years after they were on notice of the "storm warnings." Accordingly, the District Court dismissed the complaint.

D. The Third Circuit Reverses

Respondents appealed the District Court's Order granting summary judgment to Petitioners. Petitioners cross-appealed from the District Court's decision denying their motion to dismiss the complaint. On January 30, 2009, a panel of the Third Circuit Court of Appeals issued its Opinion reversing the District Court's order granting summary judgment dismissing Respondents' securities fraud claims as time-barred and again, without any analysis whatsoever, affirming the District Court's order denying Petitioners' motion to dismiss the Complaint for failure to adequately plead scienter. App. 18a-19a.[3]

On February 13, 2009, Petitioners filed a petition for rehearing *en banc*. On March 3, 2009, the Third Circuit denied Petitioners' petition for rehearing *en banc*.

---

[3] The District Court had previously granted Respondents' motion for class certification, holding that the class period ended on February 6, 2001. The District Court held that the class period ended at the time that Respondents were on "inquiry notice" of their claims that Petitioners' statements about the CLASS results were false and misleading. Respondents also appealed the District Court's Order ending the class period in February 2001. Petitioners cross-appealed the District Court's Order granting class certification. The Third Circuit affirmed the District Court's Order certifying a class, but reversed with respect to the class end date. App. 19a-20a.

REASONS FOR GRANTING THE WRIT

I. THERE IS A SUBSTANTIAL SPLIT OF AUTHORITY CONCERNING THE COMMENCEMENT OF THE LIMITATIONS PERIOD FOR A SECTION 10(b) CLAIM

A plaintiff is required to commence an action under Section 10(b) within either "(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation," whichever date is earliest. 28 U.S.C. § 1658(b). All circuit courts that have considered the issue agree that either "actual notice" or "inquiry notice" is sufficient to trigger the limitations period for Section 10(b) claims. *See Cook v. Avien, Inc.*, 573 F.2d 685, 695 (1st Cir. 1978); *LC Capital Partners, LP v. Frontier Ins. Grp., Inc.*, 318 F.3d 148, 154 (2d Cir. 2003); *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1325 (3d Cir. 2002); *Howard v. Haddad*, 962 F.2d 328, 330 (4th Cir. 1992); *Jensen v. Snellings*, 841 F.2d 600, 606 (5th Cir. 1988); *New Eng. Health Care Empls. Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 500 (6th Cir. 2003); *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 670 (7th Cir. 1998); *Great Rivers Coop. of S.E. Iowa v. Farmland Indus., Inc.*, 120 F.3d 893, 896 (8th Cir. 1997); *Betz*, 519 F.3d at 874; *Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1196 (10th Cir. 1998); *Theoharous v. Fong*, 256 F.3d 1219, 1228 (11th Cir. 2001). However, at least two distinct and conflicting standards (with several variations) concerning "inquiry notice" appear to have been adopted among the circuit courts, creating a circumstance where the same federal securities fraud claim may be viable in one circuit, but time-barred in another.

The Fourth and Eleventh Circuits appear to commence the limitations period as soon as "storm

warnings" of "possible" fraud exist that would prompt a reasonable investor to investigate whether it had been defrauded. *See, e.g., GO Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170, 179 (4th Cir. 2007); *Franze v. Equitable Assur.*, 296 F.3d 1250, 1254-55 (11th Cir. 2002).[4]

In the First, Sixth, Seventh and Tenth Circuits, the limitations period appears to commence on the date when the plaintiff becomes aware, through "storm warnings" or otherwise, of the possibility that it has been defrauded and, having exercised reasonable diligence, should have discovered the facts underlying the fraud. *See, e.g., Young v. Lepone*, 305 F.3d 1, 9-10 (1st Cir. 2002); *New Eng. Health*, 336 F.3d at 501; *Fujisawa Pharm. Co. v. Kapoor*, 115 F.3d 1332, 1334 (7th Cir. 1997); *Sterlin*, 154 F.3d at 1201. The Ninth Circuit purports to follow this approach. *Betz*, 519 F.3d at 876.

In the Second Circuit, the limitations period appears to commence on the date when "storm warnings" exist of the possibility of fraud. If the plaintiff demonstrates that it conducted an investigation, the limitations period runs from the time a reasonably diligent investor would have discovered the facts underlying the fraud. However, if the plaintiff conducts no investigation, the limitations period runs from the occurrence of the "storm warnings." *LC Capital*, 318

---

[4] The Fifth and Eighth Circuits likewise appear to trigger the limitations period as soon as a plaintiff is on notice of "storm warnings" of possible fraud, provided that a reasonably diligent inquiry could have uncovered the facts supporting a fraud claim within the limitations period. *See, e.g., Bodenhamer v. Shearson Lehman Hutton, Inc.*, 998 F.2d 1013 (TABLE), 1993 WL 277033, at **2-3 (TEXT IN WESTLAW) (5th Cir. 1993); *Jensen*, 841 F.2d at 606-07; *Great Rivers*, 120 F.3d at 898.

F.3d at 154. The Third Circuit purports to follow a similar approach, but, as set forth below, its actual application of the standard for determining when the limitations period commences conflicts with the approach of the other circuits, except the Ninth. *See In re Merck*, 543 F.3d at 161, 166.

This split of authority, which, in and of itself can be outcome determinative of the viability of a Section 10(b) claim, has been exacerbated by a further split of authority created by recent decisions in the Third and Ninth Circuits.

A. The Third And Ninth Circuits Exacerbate The Split Of Authority With Respect To The Inquiry Notice Standard

The overwhelming majority of circuit courts, including the Third Circuit prior to its 2008 decision in *Merck*, have repeatedly and routinely held that "storm warnings" – that is, information that would cause a reasonable investor to investigate his or her claims – consist of "suspicious facts" (*New Eng. Health*, 336 F.3d at 501) or information contradicting or calling into question a defendant's prior representations. *See Cook*, 573 F.3d at 697-98; *LC Capital*, 318 F.3d at 155; *GO Computer*, 508 F.3d at 179; *Kennedy v. Josephthal & Co.*, 814 F.2d 798, 802 (5th Cir. 1987); *Whirlpool Fin. Corp. v. GN Holdings, Inc.*, 67 F.3d 605, 610 (7th Cir. 1995); *Fujisawa*, 115 F.3d at 1335; *Great Rivers*, 120 F.3d at 897-98; *Sterlin*, 154 F.3d at 1203-04; *Tello v. Dean Witter Reynolds, Inc.*, 494 F.3d 956, 970 (11th Cir. 2007). In each of these circuits, "storm warnings" consist of information that indicates only the "possibility," of fraud, and need not consist of evidence concerning each element

of plaintiff's claim.[5] In that regard, to constitute "storm warnings," information need not indicate that the defendant acted with scienter. *See New Eng. Health*, 336 F.3d at 502 (rejecting plaintiff's argument that it was not on "inquiry notice" because it could not have known that defendant's statement was knowingly or recklessly false until after discovery, holding that "direct evidence of scienter is not necessary to a determination of fraud"); *Theoharous*, 256 F.3d at 1228 (rejecting plaintiff's argument that she was not on inquiry notice "because she could not reasonably have known...that the defendants had acted with...scienter"); *Betz*, 519 F.3d at 867-68 (Kozinski, C.J., dissenting) ("The panel cites no authority supporting its curious notion that an investor isn't on inquiry notice until he has concrete proof of every element of his claim, including scienter. There *is* no such authority; ten circuits disagree") (emphasis in original).

In contrast, following *Merck* and *Betz*, in the Third and Ninth Circuits, "storm warnings" that trigger a duty to investigate only exist where the plaintiff becomes aware of evidence supporting each element of its claim, including "evidence that the defendants had intentionally or deliberately and recklessly misled" the plaintiff or information that contains

---

[5] Certain circuit courts have held that "storm warnings" consist of information indicating a "probability" of fraud. *See, e.g., Newman v. Warnaco Grp., Inc.*, 335 F.3d 187, 193 (2d Cir. 2003). The "probability" and "possibility" articulations of the standard do not appear to lead to different results in the "inquiry notice" analysis. In *Merck*, the Third Circuit purported to resolve an ambiguity created by the use of both "possibility" and "probability" in its decisions by adopting the "possibility of fraud" as the appropriate standard, but then failed to apply that standard. 543 F.3d at 164.

"accusatory intent" and indicates that the defendant engaged in "malfeasance" or "intentional impropriety." *See Betz*, 519 F.3d at 878; *In re Merck*, 543 F.3d at 166. Thus, Respondents' claims in this action are viable today only because the Third Circuit departed from the overwhelming weight of authority – including its own prior decisions[6] – and adopted a standard for "inquiry notice" that effectively eliminates the concept altogether; once a plaintiff becomes aware of all the elements of its claim, there is nothing left for the plaintiff to investigate. As such, the Ninth and Third Circuit's "inquiry notice" standards are the functional equivalent of an "actual notice" standard, rendering meaningless the two year limitations period under 28 U.S.C. § 1658(b).

This split of authority already has prompted two pending petitions for *certiorari* from the decisions in *Betz* and *Merck*. As set forth in those petitions, the "inquiry notice" rule in the Third and Ninth Circuits is fundamentally inconsistent with the purpose of "inquiry notice": to encourage investors to "tak[e] the actions necessary to bring the fraud to light," *Brumbaugh v. Princeton Partners*, 985 F.2d 157, 162 (4th Cir. 1993), and "discourage [them] from adopting a wait-and-see approach" to their investments. *Sterlin*, 154 F.3d at 1202. In contrast, the Third and Ninth Circuits' standard encourages a plaintiff to sit on its

---

[6] *See Mathews v. Kidder, Peabody & Co.*, 260 F.3d 239, 252 (3d Cir. 2001) (storm warnings include "'the accumulation of information over a period of time that conflicts with representations that were made when the securities were originally purchased'") (citation omitted); *see also In re NAHC*, 306 F.3d at 1325-26 (same); *Benak ex rel. Alliance Premier Growth Fund v. Alliance Capital Mgmt., L.P.*, 435 F.3d 396, 400 (3d Cir. 2006) (same); *DeBenedictis v. Merrill Lynch & Co.*, 492 F.3d 209, 216 (3d Cir. 2007) (same).

hands notwithstanding evidence of possible fraud and wait for information sufficient to plead a claim to appear fortuitously. This standard permits plaintiffs to ignore "storm warnings" and discourages potential plaintiffs from promptly taking action to uncover and stop potential fraud.

B. The Opinion Below Further Exacerbated The Split Of Authority Regarding "Inquiry Notice"

In its Opinion below, the Third Circuit reaffirmed its holding in *Merck* and further exacerbated the split among the circuits. In so doing, the Opinion disregarded federal securities law doctrines that have been well-established in this Court and contradicted federal securities law principles in other circuits. The Third Circuit's application of its "inquiry notice" standard demonstrates that its deviation from the approach taken by the other Circuits (except the Ninth) effectively eliminates the concept of "inquiry notice" for purposes of the statute of limitations on a Section 10(b) claim.

The Third Circuit held that the FDA Disclosures in February 2001 – which specifically and directly contradicted Petitioners' alleged misrepresentations about the CLASS results – were not "storm warnings" that triggered Respondents' investigatory obligation and, because Respondents did not conduct an investigation, the commencement of the "inquiry notice" limitations period. The Third Circuit held that the FDA Advisory Committee's public disclosure of the facts that revealed the so-called "truth" regarding each of the alleged misrepresentations on which Respondents' claims are based, the public disclosure of the FDA staffers' rejection of each of the Petitioners' justifications for the Alternative Analysis as "not

justified" and "invalid," and the significant media and analyst coverage of these matters, was not sufficient to put Respondents on "inquiry notice." According to the Third Circuit,

> [t]he totality of the evidence in the public realm as of February 2001 did not indicate a possibility of fraud or even hint at any **malfeasance or intentional impropriety**; rather, the evidence only supported the view that there existed a legitimate dispute over scientific and statistical models. **But for inquiry notice of § 10(b) claims, we require some reason to suspect that defendants did not genuinely believe the accuracy of their statements.**

App. 17a (emphasis added). According to the Court, the FDA staff reports contained "highly complex scientific and statistical analysis," and the "few words and phrases," that impugned the Petitioners "lack[ed] accusatory intent" and were "buried like needles in a haystack." App. 14a.[7]

Instead, the Third Circuit held that an August 5, 2001 Washington Post article – which asserted that Petitioners "had withheld the full CLASS study data from JAMA" as well as the personal opinions of the JAMA editors and Dr. Wolfe that the JAMA Article

---

[7] The finding that these conclusions were "buried like needles in a haystack" is contradicted by the undisputed record evidence. App. 14a. As the Court specifically noted, in an analyst report dated February 7, 2001, "JP Morgan wrote that the [FDA] staff reports called the six-month analysis 'unjustified and invalid.'" App. 7a. The Court also noted that "the staff reports... received substantial media attention." App. 7a. Thus, whether or not those conclusions were buried in the staff report, securities analysts and the media disseminated them to the market.

misled them – was the first "storm warning" because the article purportedly indicated that Petitioners engaged in malfeasance and did not believe in the validity of the Alternative Analysis. Nothing, however, in the Washington Post article addresses the validity of Pharmacia's Alternative Analysis or the veracity of Petitioners' belief in it.[8] Thus, not only was there no evidentiary basis for the Third Circuit's holding, but the holding renders the concept of "storm warnings" devoid of content and meaning.

The Third Circuit's analysis not only reflected its departure from the other circuits (except the Ninth Circuit) with respect to the fundamental "inquiry notice" standard, but also raised the bar even higher for a defendant to establish "inquiry notice" than was the case in *Merck*. In so doing, the Opinion widens the circuit split even further than did *Merck*. Specifically, in *Merck*, plaintiffs claimed that Merck misre-

---

[8] The Third Circuit's identification of the Washington Post article as the "storm warning" triggering event is problematic because the article itself was triggered by the FDA Disclosures in February 2001. JA:0203. If the FDA Disclosures were sufficient to motivate the Washington Post to undertake an investigation of the purported discrepancies between the JAMA Article and the FDA Disclosures, certainly investors in Pharmacia stock should have been motivated to make a similar investigation. Confronted with the FDA Disclosures, Respondents easily could have contacted the JAMA editors and Dr. Wolfe and learned the same information that was reported by the Washington Post. The "inquiry notice" standard should not permit Respondents to abdicate their investigatory duty and wait to file a complaint until the alleged scheme is revealed through the investigatory efforts of others. *See Brumbaugh*, 985 F.2d at 162 ("Merely bringing suit after the scheme has been laid bare through the efforts of others. . . will not satisfy the requirements of due diligence when there have been prior warnings that something was amiss").

presented the cardiovascular safety profile of an NSAID, Vioxx, by attributing the high cardiovascular adverse event rate in the Vioxx arm of the VIGOR clinical trial to the alleged cardio-protective attributes of a comparator drug, naproxen (the "Naproxen Hypothesis"). Although, in September 2001, the FDA publicly rebuked Merck in a warning letter for promoting the Naproxen Hypothesis, the Court found that the FDA warning letter was not a "storm warning" because it did not give investors "reason to suspect that Merck did not believe the [N]aproxen [H]ypothesis." 543 F.3d at 172. In particular, the *Merck* court stated that "***the FDA did not charge that the [N]aproxen [H]ypothesis was wrong***." *Id.* at 170 (emphasis added). Instead, the Court held, the *Merck* plaintiffs had no reason to suspect that Merck did not believe in the Naproxen Hypothesis until the public disclosure of a study conducted by Harvard University that demonstrated "an increased risk of heart attack in patients taking Vioxx compared with patients taking Celebrex and placebo." *Id.* at 172.

While Petitioners believe that *Merck* was wrongly decided, there is no question that the Harvard Study, found by the *Merck* court to be a "storm warning," is the equivalent of the FDA Disclosures here. Like the Harvard study in *Merck*, the FDA Disclosures contradicted Petitioners' representations about the validity of their Alternative Analysis and the FDA Disclosures ***did*** state that Pharmacia's Alternative Analysis was wrong. Significantly, the FDA Disclosures revealed the so-called "truth" about each one of the misrepresentations alleged in the complaint,[9] were

---

[9] Even Respondents' expert acknowledged, in his expert report submitted in connection with Respondents' motion for class

widely reported by the media and securities analysts, and were at least as sufficient as the Harvard study to cause Respondents to suspect that Petitioners' belief in the validity of the Pharmacia Alternative Analysis was implausible or without basis. By holding to the contrary, the Third Circuit defined "storm warnings" in a way that makes it virtually impossible to establish "inquiry notice."

The Third Circuit's attempt to justify its holding that the February 2001 FDA Disclosures were not "storm warnings," further confounds the split of authority over the definition of "storm warnings," and reveals the legal and logical infirmity of its approach. The Third Circuit dismissed the fact that the FDA Disclosures specifically and directly contradicted Defendants' allegedly false statements – which would be dispositive of "storm warnings" in every circuit but the Ninth – on the basis that the FDA Disclosures "did not indicate a possibility of fraud" because they suggested only that there was "a legitimate dispute over scientific and statistical models." App. 13a, 17a. Thus, according to the Third Circuit, the "possibility" that a misrepresentation is the result of fraud is negated by the "possibility" that a misrepresentation is

---

certification, that "[f]rom the information available on the FDA's website on February 6, 2001, the astute observer could discern from the FDA reports that the CLASS study lasted longer than six months, and that data from the entire study period failed to demonstrate with statistical or clinical significance any GI safety advantage for Celebrex compared to diclofenac or ibuprofen, either with respect to the pre-determined primary endpoint of complicated ulcers or the combined endpoint of complicated and symptomatic ulcers. The FDA also discussed that Pharmacia's 'combined' endpoint was a post-hoc, retrospective analysis, was not an endpoint of the CLASS study, and did not follow the study protocols." JA:1238.

the result of a good faith misunderstanding or some reason other than fraud. That holding is entirely inconsistent with the concept of "storm warnings" and the purpose of "inquiry notice" and conflicts with rulings in other circuits.

For example, in *Fujisawa*, the Seventh Circuit expressly rejected the plaintiff's argument that it was not put on inquiry notice by the revelation of misrepresentations that arguably were not the product of fraud:

> [Plaintiff's] counsel have done an elaborate dance around the facts known to their client before August of 1991, arguing with great ingenuity that every single one of them can be explained without hypothesizing fraud by [the defendant]. That misses the point. Of course a suspicion may turn out to be unfounded; that doesn't mean that it would not induce a careful person to inquire whether it *was* unfounded.

115 F.3d at 1336 (emphasis in original). In *Tregenza v. Great American Communications Co.*, 12 F.3d 717 (7th Cir. 1993), the Seventh Circuit rejected the same argument. There, the plaintiffs alleged that the defendant misrepresented that a stock was "greatly undervalued," such that it would shortly double in value and would not, in any case, decline in value by more than 10 percent. The court found that the plaintiffs were on "inquiry notice" of a Section 10(b) claim arising from these representations at a point when the stock had lost almost 90 percent of its value, even though the stock price decline "did not *prove* fraud," and notwithstanding that "[defendant] might have believed reasonably and in good faith, though erroneously, that the stock was undervalued." *Id.* at 720 (emphasis in original). According to the

Court, the stark contradiction between the representations made by the defendants and the facts that subsequently became public should have caused "an investor [to] become suspicious and investigate[] when [the defendant's] emphatic and precise prediction was so swiftly and dramatically falsified." *Id.*; *see also GO Computer*, 508 F.3d at 179 ("[f]raud by its nature is something perpetrators take pains to disguise, and plaintiffs' notion that allegedly concealed fraud excuses the need for any diligence on plaintiffs' part would permit statutory periods to be tolled indefinitely, even when plaintiffs could reasonably be expected to bring suit").

The Third Circuit held that the FDA Disclosures did not trigger Respondents' duty to investigate because those documents contained "highly complex scientific and statistical analysis," and the hypothetical ordinary investor need not be a "scientific expert." App. 11a, 14a. The Third Circuit's holding contradicted well-established precedent in other circuits regarding the definition of the hypothetical "reasonable investor" by which "inquiry notice" is evaluated.[10] In that regard, "inquiry notice" is not determined on the basis of a "plaintiff's actual awareness of suspicious circumstances or even on the ability of a

---

[10] In any event, Respondents' investments in Pharmacia were managed by professional investment managers who testified during discovery that they understood the February 2001 disclosures about the results of CLASS. JA:0770-806. The Third Circuit also ignored the undisputed record evidence that securities analysts – as is their function in the market – distilled the scientific information in their reports for the benefit of investors. JA:0714-15; JA:0184-85; *see Ross v. Bank S., N.A.*, 885 F.2d 723, 744 (11th Cir. 1989) ("In a well-developed market, market professionals sift through public disclosures for relevant information").

plaintiff to understand their import." *Cetel v. Kirwan Fin. Grp., Inc.*, 460 F.3d 494, 507 (3d Cir. 2006); *see also Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 656 (4th Cir. 2004) ("it is important to note that a 'reasonable investor' is neither an ostrich, hiding her head in the sand from relevant information, nor a child, unable to understand the facts and risks of investing"). Rather, a plaintiff is deemed to be on notice of all information in the market irrespective of its technical complexity. *Cetel*, 460 F.3d at 507; *see also Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1129 (7th Cir. 1993) ("Competition among savvy investors leads to a price that impounds all available information, even knowledge that is difficult to articulate"); *Wieglos Commonwealth Edison Co.*, 892 F.2d 509, 516 (7th Cir. 1989) ("[p]rompt incorporation of news into stock price is the foundation for the fraud-on-the-market doctrine and therefore supports a truth-on-the-market doctrine as well"); *Schneider v. Vennard* (*In re Apple Computer Sec. Litig.*), 886 F.2d 1109, 1114 (9th Cir. 1989).

Further, the Third Circuit's holding is inconsistent with the "efficient market" theory adopted by this Court in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). In *Basic*, this Court established a "fraud on the market" presumption of reliance in Section 10(b) actions based upon the hypothesis that all information about a security, which is traded in an efficient market, is incorporated into the price of that security. *Id.* at 246-47. Respondents' claims in this case are expressly based on the "fraud on the market" theory to establish that they relied on the alleged misrepresentations in the JAMA Article, even though they did not read the Article. JA: 0272-73 ¶¶ 78-79 ("the market for Pharmacia securities digested current information with respect to Pharmacia from all

publicly available sources. . . "). The Third Circuit accepted the allegation that the hypothetical ordinary investor was defrauded by the highly technical JAMA Article, which no lay person could reasonably be expected to understand. At the same time, the Third Circuit held that the FDA Disclosures were not "storm warnings" because they consisted of "a highly complex scientific and statistical analysis." App. 14a. The Third Circuit cannot have it both ways: if the hypothetical ordinary investor can claim to be defrauded by the disclosures in the JAMA Article on the basis of the "fraud on the market" theory, that same investor cannot claim that the FDA Disclosures did not constitute "storm warnings" because they were too technical to understand. *See In re Merck & Co. Sec. Litig.*, 432 F.3d 261, 270-71 (3d Cir. 2005) ("Union is trying to have it both ways: the market understood all the good things that Merck said about its revenue but was not smart enough to understand the co-payment disclosure. An efficient market for good news is an efficient market for bad news").

Finally, the Opinion ignores substantial authority regarding the significance of stock price movement in determining the existence of "storm warnings." *See Young*, 305 F.3d at 13 n.9 (including a 40% drop in the company's stock price as one of the factors that collectively amounted to "storm warnings" of fraudulent activity); *Caprin v. Simon Transp. Servs., Inc.*, 99 Fed. Appx. 150, 156 (10th Cir. 2004) (concluding that a "precipitous decline" in stock price was one of the constitutive elements of "sufficiently threatening storm clouds [that] put the [plaintiffs] on inquiry notice of possible fraudulent activity"). Indeed, in *Merck*, the Third Circuit held that the information known to a plaintiff must be legally "material," as demonstrated by stock price declines, before trigger-

ing a duty to investigate. In that regard, the Court stated that its "past inquiry notice decisions have taken into account the market reaction to disclosures that purportedly constitute storm warnings," and held that the "lack of significant movement in Merck's stock price following the FDA warning letter ... supports a conclusion that the letter did not constitute a sufficient suggestion of securities fraud to trigger a storm warning of culpable activity under the securities laws." 543 F.3d at 167, 171. Thus, in *Merck*, where the Third Circuit found that there was no "significant movement" in the price of Merck stock, the Court applied the principle that stock price movement is indicative of "storm warnings" as a basis to find that there were no "storm warnings."

In contrast, here, where there was a significant stock price decline following the February 2001 FDA Disclosures, the Third Circuit disregarded this principle and held that the stock price decline was not indicative of "storm warnings." Specifically, it is undisputed – indeed, Respondents' expert opined – that Pharmacia's stock price declined by a statistically significant amount following the FDA Disclosures in February 2001. Nevertheless, the Third Circuit held, without any support in the evidentiary record, that "the drop in stock price following the events of February 6-8, 2001 did not indicate fraud or even the possibility of fraud." App. 13a. Rather, the Court speculated that "the drop in price is easily explained by the fact that the market had been expecting that the FDA would approve a label change." App. 13a. The Court's error in disregarding the evidence is made clear by the fact that Pharmacia's stock price did not decline following the publication of the Washington Post article, which the

Third Circuit held to be the applicable "storm warnings" that triggered Respondents' duty to investigate.

The Third Circuit's "inquiry notice" standard not only conflicts with the "inquiry notice" standards established in other circuits, it undermines the purpose and objective of "inquiry notice." Significantly, the Third Circuit's application of its "inquiry notice" standard reveals that it is not an "inquiry notice" standard at all, but, rather, effectively, is an "actual notice" standard. As such, the Third Circuit's Opinion in this action further exacerbates the split among the circuits, even more so than its prior decision in *Merck* and the Ninth Circuit's decision in *Betz*. Accordingly, this Court should grant Defendants' petition to ensure a uniform and appropriate standard for determining when the limitations period commences in an action under Section 10(b).[11]

II. THE THIRD CIRCUIT'S OPINION CONFLICTS WITH PRECEDENT OF THIS COURT BECAUSE IT DID NOT ADDRESS THE ANALYSIS MANDATED BY *TELLABS*

This Court should also grant Petitioners' petition for a writ of *certiorari* on the important question of whether the Third Circuit's Opinion conflicts with the precedent set forth in this Court's decision in

---

[11] This Court's determination with respect to the "inquiry notice" standard for purposes of the statute of limitations analysis may also be dispositive of the parties' dispute with respect to the termination date for the class period. Because it would be unreasonable for Respondents to rely on Petitioners' alleged misrepresentations after the appearance of "storm warnings," if the Court determined that the FDA Disclosures were "storm warnings," the class period would have to end on the date of those disclosures.

Tellabs. In *Tellabs*, this Court established a mandatory framework by which lower courts must analyze a complaint's allegations of scienter in connection with a claim under Section 10(b) of the Exchange Act. The Third Circuit, however, engaged in no analysis regarding the adequacy of Respondents' scienter allegations, let alone the analysis mandated by this Court in *Tellabs*. Indeed, the Third Circuit completely disregarded *Tellabs*. Under circumstances where, as here, a federal court completely overlooks or ignores a prior ruling of this Court, certiorari is warranted. *See Horn v. Banks*, 536 U.S. 266, 267 (2002) (granting certiorari because "[i]n avoiding the [analysis required by the Supreme Court in *Teague v. Lane*, 489 U.S. 288 (1989)], the Court of Appeals directly contravened [*Caspari v. Bohlen*, 510 U.S. 383 (1994)]"); *Lambert v. Wicklund*, 520 U.S. 292, 293 (1997) (granting certiorari "[b]ecause the Ninth Circuit's holding is in direct conflict with our precedents"); *United States v. Bass*, 536 U.S. 863-64 (2002) (granting certiorari because "[t]he Sixth Circuit's decision is contrary to [*United States v. Armstrong*, 517 U.S. 456 (1996)]").

The PSLRA enhanced the pleading requirements for claims brought under the Exchange Act. In that regard, the PSLRA requires that a plaintiff asserting a claim under the Exchange Act must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). To bring a claim under Section 10(b), a plaintiff must allege that the defendant acted with scienter, that is, that the defendant acted with fraudulent intent. *Tellabs*, 127 S. Ct at 2507.

In *Tellabs*, this Court addressed the pleading standard for scienter for purposes of the PSLRA. This Court held that a complaint alleging claims under Section 10(b) will survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6) "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." 127 S. Ct at 2510. Moreover, this Court held that a court reviewing a complaint's scienter allegations under the PSLRA must "consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Id.* at 2509. The court must determine whether "*all* of the facts alleged, taken collectively, give rise to a strong inference of scienter...." *Id.* (emphasis in original). When "determining whether the pleaded facts give rise to a 'strong' inference of scienter, the court must take into account plausible opposing inferences." *Id.* A court "must engage in a comparative evaluation; it must consider, not only inferences urged by the plaintiff... but also competing inferences [of nonfraudulent intent] rationally drawn from the facts alleged." *Id.* at 2504.

On December 22, 2003, Petitioners moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) arguing, among other things, that the complaint failed to adequately plead scienter, an essential element of a claim under Section 10(b). By Order dated May 19, 2004, the District Court, without any written analysis, denied Petitioners' motion to dismiss the complaint. On appeal, Petitioners argued that the District Court erred in denying Petitioners' motion to dismiss because, among other

things, Respondents' allegations of an "inference of scienter" were not as cogent or compelling as any competing inferences of non-fraudulent intent as required under *Tellabs*.

The Third Circuit affirmed the District Court's Order denying Petitioners' motion to dismiss. Except for the conclusory statement that "[w]hen examined as a whole... the Amended Complaint is replete with allegations that defendants acted with the requisite scienter" (App. 19a), the Court of Appeals engaged in no analysis whatsoever regarding the adequacy of Respondents' scienter allegations. In particular, the Third Circuit completely failed to undertake any of the comparative analysis required by this Court in *Tellabs*. On this basis alone *certiorari* should be granted to ensure that the lower courts comply with the rulings of this Court.

Had the Third Circuit engaged in the analysis required by *Tellabs*, it necessarily would have concluded that the inferences of non-fraudulent intent overwhelm any inferences of fraudulent intent – indeed, that there were no legally cognizable inferences of fraudulent intent alleged in the complaint.

First, the complaint does not plead particularized facts creating any inference – much less the requisite strong inference – that Petitioners acted with an intent to deceive, manipulate, or defraud. Rather, Respondents' scienter allegations consist of only two paragraphs alleging that:

- Because of their positions within the Company "each individual defendant knew that the CLASS study data did not support Pharmacia's claim that Celebrex had a safety profile

superior to those of other NSAIDs." JA:0270-71 ¶ 76.

- "The numerous changes to the original [CLASS] protocol and the exclusion of unfavorable data demonstrate a conscious effort to deceive." JA:0271 ¶ 77.

Respondents contend that these meager allegations "demonstrate a conscious effort to deceive on the part of the defendants." JA:0271 ¶ 77. However, such conclusory assertions have routinely been rejected as insufficient to plead scienter. *See Maldonado v. Dominguez*, 137 F.3d 1, 10 (1st Cir. 1998) (holding that imputation of scienter to a defendant based on allegations that he "must have known" about the fraudulent activity by virtue of his position in the company are "precisely the types of inferences which [courts], on numerous occasions, ha[ve] determined to be inadequate to withstand Rule 9(b) scrutiny"); *Rosenbloom v. Adams, Scott & Conway, Inc.*, 552 F.2d 1336, 1339 (9th Cir. 1977) (same); *Winer Family Trust v. Queen*, 503 F.3d 319, 326 (3d Cir. 2007) (same).

Second, even assuming that Respondents' allegations constituted particularized allegations sufficient to create an inference of scienter, the Third Circuit was required to undertake the comparative analysis established in *Tellabs*. For example, the Third Circuit should have assessed whether the inference that Petitioners intended to deceive investors about the results of CLASS by publishing inaccurate or incomplete data is as cogent and compelling as the inference of non-fraudulent intent which arises from the undisputed facts that (i) before publishing the JAMA Article, Petitioners had submitted the complete CLASS data to the FDA for review, knowing that the FDA would publish the full data from CLASS; (ii)

Petitioners submitted their Briefing Document to the FDA Advisory Committee, which included both the analysis that Respondents now claim was misleading when published in the JAMA Article and the analysis that Respondents claim should have been published in the JAMA Article; (iii) Petitioners knew that their Alternative Analysis set forth in the Briefing Document would be subject to scrutiny as part of the FDA Advisory Committee process and that the basis for the Alternative Analysis would be publicly disclosed.

In addition, the Third Circuit should have assessed whether it is reasonable to infer that ten of the sixteen JAMA Article authors, who are not Pharmacia employees and are among the most-renowned experts in their fields, are likely to have recklessly or consciously risked their careers and reputations by agreeing to lend their names to a major publication that they did not believe was truthful and scientifically valid – especially when they knew that the complete CLASS data had already been disclosed to the FDA and would be used by the FDA to determine the request for a label change. *See DiLeo v. Ernst & Young*, 901 F.2d 624, 629 (7th Cir. 1990) (alleged motive to obtain fees insufficient to plead scienter: "An accountant's greatest asset is its reputation for honesty, followed closely by its reputation for careful work. Fees for two years' audits could not approach the losses [defendant] would suffer from a perception that it would muffle a client's fraud.... It would have been irrational for any of them to have joined cause with [their client]"); *Melder v. Morris*, 27 F.3d 1097, 1104 (5th Cir. 1994) (same).

Ultimately, the Third Circuit was required to determine whether it is more reasonable, compelling, and cogent to infer that when Petitioners recognized

(and fully disclosed) that CLASS failed to meet its primary endpoint, they presented an Alternative Analysis of the CLASS data to express their good-faith belief that CLASS nevertheless generated valuable data regarding the GI safety of Celebrex as compared to the comparator NSAIDs. In that regard, Petitioners' Alternative Analysis, set forth in the JAMA Article, reflected nothing more than a legitimate interpretation of scientific data, and a scientific dispute over competing interpretations of data cannot give rise to a strong inference of scienter.[12]

In light of the undeniably cogent and compelling inference of non-fraudulent intent that arise from the undisputed facts, the Third Circuit was required to engage in the comparative analysis mandated by *Tellabs* and its failure to do so merits the granting of a writ in this case.

---

[12] *See In re MedImmune, Inc. Sec. Litig.*, 873 F. Supp. 953, 966 (D. Md. 1995); *Padnes v. Scios Nova, Inc.*, No. C 95-1963-MHP, 1996 WL 539711, at *5 (N.D. Cal. Sept. 18, 1996); *In re Biogen Sec. Litig.*, 179 F.R.D. 25, 38 (D. Mass. 1997).

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that this Court grant *certiorari* in the present case.

Respectfully submitted,

WILLIAM A. DREIER
STEVEN A. KARG
NORRIS, MCLAUGHLIN & MARCUS, P.A.
P.O. Box 1018
721 Route 202-206
Somerville, New Jersey 08876
(908) 722-0700

DENNIS J. BLOCK
Counsel of Record
JONATHAN M. HOFF
JOSHUA R. WEISS
CADWALADER, WICKERSHAM & TAFT LLP
One World Financial Center
New York, New York 10281
(212) 504-6000

Counsel for Petitioners

April 22, 2009

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 07-4500 & 07-4564

ALASKA ELECTRICAL PENSION FUND; CITY OF SARASOTA FIREFIGHTERS' PENSION FUND; INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 132 PENSION PLAN; NEW ENGLAND HEALTH CARE EMPLOYEES PENSION FUND; PACE INDUSTRY UNION-MANAGEMENT PENSION FUND; CHEMICAL VALLEY PENSION FUND OF WEST VIRGINIA, as Class Representatives, on behalf of themselves and all other similarly situated

v.

PHARMACIA CORPORATION; PFIZER, INC.; FRED HASSAN; DR. G. STEVEN GEIS; CARRIE COX

Alaska Electrical Pension Fund; City of Sarasota Firefighters' Pension Fund; International Union of Operating Engineers Local 132 Pension Plan; New England Health Care Employees Pension Fund; Pace Industry Union-Management Pension Fund; Chemical Valley Pension Fund of West Virginia,

Appellants in 07-4500

Pharmacia Corporation; Pfizer, Inc.; Fred Hassan; Dr. G. Steven Geis; Carrie Cox,

Appellants in 07-4564

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil Nos. 3-03-cv-01519, 3-03-cv-01691, 3-03-cv-01808, 3-03-cv-01964, 3-03-cv-02149, 3-03-cv-02283)
District Judge: The Honorable Anne E. Thompson

Argued: November 21, 2008

Before: BARRY, CHAGARES, *Circuit Judges,* and RESTANI, **Judge*

(Opinion Filed: January 30, 2009)

Eric A. Isaacson, Esq. (Argued)
Arthur C. Leahy, Esq.
Matthew P. Montgomery, Esq.
Coughlin, Stoia, Geller, Rudman & Robbins
655 West Broadway
Suite 1900
San Diego, CA 92101-0000

Peter S. Pearlman, Esq.
Cohn, Lifland, Pearlman, Herrmann & Knopf
Park 80 Plaza West One
Saddle Brook, NJ 07663-0000

Counsel for Appellants/Cross Appellees

Gregg S. Levin, Esq.
Joshua C. Littlejohn, Esq.
Joseph F. Rice, Esq.
Ann K. Ritter, Esq.

---

* Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

Motley Rice
28 Bridgeside Boulevard
P.O. Box 1792
Mount Pleasant, SC 29465-0000

Counsel for Appellant/Cross Appellee
Pace Industry Union-Management Pension Fund

Jonathan M. Hoff, Esq. (Argued)
Jason M. Halper, Esq.
Joshua R. Weiss, Esq.
Cadwalader, Wickersham & Taft
One World Financial Center
New York, NY 10038-0000

William A. Dreier, Esq.
Steven A. Karg, I, Esq.
Robert Mahoney, Esq.
Norris, McLaughlin & Marcus
721 Route 202-206
P.O. Box 5933
Bridgewater, NJ 08807-0000

Counsel for Appellees/Cross Appellants

OPINION OF THE COURT

BARRY, *Circuit Judge*

In this securities fraud class action, plaintiffs allege that defendants violated §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 by making, with scienter, materially false statements about a clinical study of Celebrex, a popular anti-inflammatory medication. In particular, defendants are alleged to have misled investors by distorting the study's results with the intent to show that Celebrex had a better safety profile than similar medications. Finding the action to be untimely, the District Court granted summary

judgment to defendants. This appeal and cross-appeal followed.

I. Factual Background

Celecoxib, known and marketed commercially as Celebrex, is an anti-inflammatory prescription drug sold by defendant Pharmacia Corporation. Substantially more expensive than many other nonsteroidal anti-inflammatory drugs ("NSAIDs"), Celebrex's promise was rooted in the hope that it would cause fewer gastrointestinal ("GI") side-effects than the less costly NSAIDs.[1] To help the hope become a reality, defendants[2] commissioned a long-term clinical study of Celebrex's effect on the GI system, the Celecoxib Long-term Arthritis Safety Study ("CLASS study"). This litigation focuses on the aftermath of that study.

According to the complaint, the results of the CLASS study were a disappointment to defendants: Celebrex did not show the desired reduction in GI side-effects as compared to the other drugs studied. Fearing a decrease in sales and stock price, defendants allegedly undertook to distort the results of the study so that it would appear that Celebrex possessed a better GI safety profile than, in fact, it did. Towards this end, in April 2000, defendants released only the results from the first six months of the

---

[1] Unlike traditional NSAIDs, which inhibit both the COX-1 and COX-2 enzymes, Celebrex is a selective COX-2 inhibitor. Because the inhibition of COX-1 enzymes often leads to negative GI side-effects, it was hoped that selective COX-2 inhibitors would not possess the harmful side-effects associated with traditional NSAIDs.

[2] Defendants include Pharmacia Corp., Pfizer, Inc., and individual defendants Fred Hassan, Steven Geis, and Carrie Cox.

CLASS study; those results, divorced from the entire set of data, were capable of positive construction.

Defendants released the truncated results of the CLASS study with great fanfare, declaring that the study "shows that Celebrex has a truly exceptional safety profile," and that "the long-term outcome data paints a clear and compelling picture of Celebrex's safety versus NSAIDs." (Joint App. ("JA") 59, 64.) Some documents issued by defendants noted that the CLASS study lasted a full thirteen months, but the reason for excising the last seven months from the analysis was not revealed.

Scientists affiliated with defendants then drafted an article based on the truncated results and submitted it for publication to the *Journal of the American Medical Association* ("JAMA"). As would become known only later, however, neither defendants nor the article's authors informed JAMA that the data in the article was incomplete. In September 2000, JAMA published the article, which reached the following conclusion: "The overall incidence of GI symptoms experienced by patients taking [Celebrex] was significantly lower than by those taking NSAIDs, as was the rate of withdrawal [from the study] due to GI intolerability." (*Id.* at 45.)

Defendants hoped to convince the FDA to allow Celebrex to be marketed without the standard GI warning label required for other NSAIDs, and so submitted the complete data from the CLASS study to the FDA in June 2000. FDA staff members, in preparation for hearings on the warning label issue, reviewed the data. On February 6, 2001, the reports of those staff members were published on the FDA's website, alongside defendants' own report. Defendants' report defended the decision to use only the

truncated data, asserting that data after the six-month point was biased in favor of the comparator drugs:

> The GI safety data presented are for the six-month treatment timepoint based on the analysis of risk factors prespecified in the protocol. In brief, a disproportionate withdrawal of patients at high risk of an ulcer complication from the entire study was observed after six months (depletion of susceptibles). Additionally, a significantly greater withdrawal of patients on diclofenac for GI intolerance occurred during the initial six months of the study. The withdrawal of patients for GI intolerance prematurely removed a group at high risk for ulcer complications and symptomatic ulcers from the diclofenac treatment arm (informative censoring).

(*Id.* at 381.)

The FDA staff reports, stating in part as follows, disagreed with defendants' reliance on the truncated data:

> • A rheumatologist's report stated that it was "unclear" that the rationale put forth by defendants "represented a significant bias in assessment of the outcome." (*Id.* at 631.)
>
> • A gastroenterologist's report stated that defendants' "rationale for analyzing the first 6 months as a meaningful endpoint independent of the success at the study completion is not convincing." (*Id.* at 472.) However, this report also stated that "[t]he six-month analysis will be reviewed only as a potentially supportive analysis." (*Id.* at 482.)

- A statistician's report rejected the six-month analysis as "not valid," and asserted that there was "no reason to include information only in the first 6 months." (*Id.* at 666.)

These reports were prepared to assist the FDA's Arthritis Advisory Committee ("Advisory Committee") in deciding whether to recommend the label change sought by defendants. The day after the publication of the reports, the Advisory Committee held hearings on the issue, and ultimately declined to recommend the label change. The staff reports and the Advisory Committee's recommendation received substantial media attention. The market also took note of the disappointing outcome: between February 6-8, 2001, the price of Pharmacia's stock dropped approximately 9.0%.

After these events, defendants issued a series of positive statements about Celebrex's GI safety profile as well as about the chances for a label change. Defendants claimed, for example, that the CLASS study data presented a "compelling case" for a label change, and that because the CLASS study was "an extremely rigorous and complex trial," it was "difficult for the [Advisory Committee] to analyze." (*Id.* at 171, 1519.)

Financial analysts also continued to rate Pharmacia's stock positively. Even while noting the reduced chances for a label change and the disagreement over the results of the CLASS study, JP Morgan, Merrill Lynch, Lehman Brothers, and Bank of America all continued to rate Pharmacia's stock as a "buy" or "strong buy." Several analysts noted the challenge to defendants' use of truncated data: JP Morgan wrote that the staff reports called the six-month analysis "unjustified and invalid," and Bloomberg News wrote that defendants were only able to show a benefit "by

looking at selected parts of the data—a practice discouraged by the [FDA]." (*Id.* at 714, 719.)

Months later, on August 5, 2001, the Washington Post reported that defendants had withheld the full CLASS study data from JAMA. In the article, JAMA's editor described herself as "disheartened" and stated that "a level of trust . . . was, perhaps, broken." (*Id.* at 203.) Additionally, a scientist who wrote an editorial published in conjunction with the JAMA article stated that he was "flabbergasted" when he saw the complete data; another scientist "said he complained to JAMA after noticing differences between the published [JAMA] report and the data presented to the FDA." (*Id.* at 203-04.)

After the Washington Post article raised the red flag of impropriety, other sources began to question defendants' good faith. For example, an article from The Sunday Times noted that the scandal involving the CLASS study had inspired medical journals to "stop drug firms from 'cheating' on medical studies." (*Id.* at 1360.) On June 1, 2002, an article in the British Medical Journal called the "explanations for [the] serious irregularities [in the JAMA article] . . . inadequate." (*Id.* at 757.) The article also stated that "[p]ublishing and distributing overoptimistic short term data using post hoc changes to the protocol, while omitting disappointing long term data of two trials . . . is misleading." (*Id.*) Following the publication of this article, the price of Pharmacia's stock dropped 7% in three days.

II. Procedural History

This action was initiated on April 7, 2003, when the first securities fraud class action complaint was filed. Related actions were shortly thereafter consoli-

dated into it. The District Court denied defendants' motion to dismiss and granted plaintiffs' motion for class certification, but shortened the class period by more than a year, finding that investors could not have reasonably relied on defendants' alleged misrepresentations after February 6, 2001, the date on which the FDA staff reports were published.

Defendants subsequently moved for summary judgment on statute of limitations grounds, asserting that if reliance was unreasonable after February 6, 2001, plaintiffs must necessarily have been on inquiry notice of their claims at that time. Because the first securities fraud suit was filed on April 7, 2003, and the statute of limitations for § 10(b) claims is two years, *see* 28 U.S.C. § 1658(b), defendants asserted that plaintiffs' claims were untimely. The District Court agreed, and granted defendants' motion for summary judgment.

The cross-appeals of the parties are now before us for our consideration.

III. Jurisdiction and Standard of Review

The District Court had jurisdiction pursuant to 15 U.S.C. § 78aa. We have jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review over the Court's decision to grant defendants' motion for summary judgment and the decision to deny their motion to dismiss. *See, e.g., Mest v. Cabot Corp.*, 449 F.3d 502, 510 n.7 (3d Cir. 2006); *Farber v. City of Patterson*, 440 F.3d 131, 134 (3d Cir. 2006). The decision to certify a class action and the determination of the class period are reviewed for abuse of discretion. *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 136 (3d Cir. 2000).

IV. Legal Analysis

There are a number of issues before us on these appeals. Plaintiffs challenge, first and foremost, the District Court's grant of summary judgment on statute of limitations grounds. Plaintiffs also dispute the Court's determination of the class period. On cross-appeal, defendants assert that the Court erred in denying their motion to dismiss, and in granting plaintiffs' motion for class certification. We address each of these issues in turn.

A. Inquiry Notice and the Statute of Limitations

The District Court determined that investors were on inquiry notice of possible securities fraud as of February 2001. The statute of limitations will begin to run when the plaintiff is on inquiry notice. "Whether the plaintiffs, in the exercise of reasonable diligence, should have known of the basis for their claims depends on whether they had sufficient information of possible wrongdoing to place them on inquiry notice or to excite storm warnings of culpable activity."[3] *Benak ex rel. Alliance Premiere Growth Fund v. Alliance Capital Mgmt., L.P.*, 435 F.3d 396, 400 (3d Cir. 2006) (internal citations and quotations omitted). The inquiry notice determination requires a "totally objective" analysis that pinpoints the time at which "a reasonable investor of ordinary intelligence would have discovered the information [demonstrating possible liability] and recognized it as a storm warning." *Mathews v. Kidder, Peabody & Co., Inc.*, 260 F.3d 239, 252 (3d Cir. 2001).

---

[3] Plaintiffs do not contend that they "exercised reasonable due diligence and yet were unable to discover their injuries." *Mathews v. Kidder, Peabody, & Co., Inc.*, 260 F.3d 239, 252 (3d Cir. 2001). Thus, if we find storm warnings of fraud, plaintiffs' claims are untimely.

In line with this objective analysis, plaintiffs are "presumed to have read prospectuses, quarterly reports, and other information relating to their investments." *Id.* However, the hypothetical reasonable investor need not be a scientific expert; to the contrary, the relevant inquiry is whether a reasonable investor of "ordinary intelligence" would have recognized the available information as indicative of possible fraud. *Id.*

Inquiry notice seeks to deter putative plaintiffs from sitting on their hands, awaiting the discovery of the elusive smoking gun. Inquiry notice will thus be triggered when plaintiffs "should have discovered the general fraudulent scheme," *In re NAHC, Inc. Secs. Litig.*, 306 F.3d 1314, 1326 (3d Cir. 2002) (internal citations and quotations omitted), and "cannot avoid the time bar simply by claiming they lacked knowledge of the details or narrow aspects of the alleged fraud." *Benak*, 435 F.3d at 400 (internal citations and quotations omitted).

Our recent decision in *In re Merck & Co., Inc. Securities, Derivative, & 'ERISA' Litigation*, 543 F.3d 150 (3d Cir. 2008) (hereinafter "*Merck*") informs our decision here. In *Merck*, we were faced with a similar set of factual circumstances: after a long-term clinical study of Merck's own blockbuster drug, Vioxx, the company published a questionable interpretation of the study's results, allegedly in order to boost Vioxx's sales and Merck's stock price. The questionable interpretation advanced by Merck attempted to explain why patients taking Vioxx experienced a higher rate of negative cardiovascular events than patients taking the study's comparator drug, naproxen. This so-called naproxen hypothesis emphasized the possibility that naproxen had a positive impact on the cardi-

ovascular system, and discounted the possibility that Vioxx had a negative impact.

The science behind this explanation was debatable, and, consequently, the FDA scolded Merck for its repeated promotion of the naproxen hypothesis. In a public warning letter issued to Merck, the FDA called the marketing campaign for Vioxx "false, lacking in fair balance, or otherwise misleading . . . . and [minimizing of] the potentially serious cardiovascular findings." *Id.* at 156 (internal citations and quotations omitted). The FDA ordered Merck to send letters to doctors in order "to correct false or misleading impressions and information." *Id.* at 157. Despite the public nature of these strong words, as well as, *inter alia*, news reports questioning the naproxen hypothesis and consumer lawsuits alleging negative cardiovascular effects from Vioxx, we found that investors were not on inquiry notice of securities fraud.

Most importantly for our purposes here, Merck found that inquiry notice, in securities fraud suits, requires storm warnings indicating that defendants acted with scienter. "Thus, to trigger storm warnings of culpable activity, in the context of a claim alleging falsely-held opinions or beliefs, investors must have sufficient information to suspect that the defendants engaged in culpable activity, i.e., *that they did not hold those opinions or beliefs in earnest.*" *Id.* at 166 (emphasis added) (internal citations and quotations omitted).

Accordingly, for investors to be on inquiry notice of § 10(b) claims, there must be some indication that defendants did not, in fact, hold the views expressed. Inquiry notice requires storm warnings of "culpable activity." *See Benak*, 435 F.3d at 400. Under § 10(b), a corporation does not engage in culpable activity

unless it acted with scienter.[4] Scienter is not incidental to § 10(b), it is elemental.[5]

In support of a finding of inquiry notice in February 2001, defendants point to the drop in the price of Pharmacia's stock, the FDA staff reports, the Advisory Committee meeting, analyst reports discussing the events at the FDA, and the fact that the full length of the CLASS study had long been publicly known. Whatever else those facts may have indicated, they did not provide storm warnings of possible fraud.

For one thing, the drop in stock price following the events of February 6-8, 2001 did not indicate fraud or even the possibility of fraud. Rather, the drop in price is easily explained by the fact that the market had been expecting that the FDA would approve a label change. When the Advisory Committee issued a neg-

---

[4] Thus, as defamation is not assault, so is § 10(b) not § 11. Section 11 does not require a plaintiff to plead or to prove scienter; § 10(b) does. This is a distinction with a difference, both in terms of what a plaintiff must show for recovery *and* in terms of what information must be available for inquiry notice to take hold. We did not find it necessary in *Merck* to discuss § 11, nor do we find it necessary to do so here. Were this is a § 11 case, which it is not, the evidence in the public realm as of February 2001 might well have given rise to storm warnings of misstatements, and thus triggered the second step of the inquiry notice analysis—the duty to investigate potential claims.

[5] "To state a valid claim under Rule 10b-5, a plaintiff must show that the defendant (1) made a misstatement or an omission of a material fact (2) *with scienter* (3) in connection with the purchase or the sale of a security (4) upon which the plaintiff reasonably relied and (5) that the plaintiff's reliance was the proximate cause of his or her injury." *Semerenko v. Cendant Corp.*, 223 F.3d 165, 174 (3d Cir. 2000) (emphasis added); *see also Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (requiring more than evidence of negligence in § 10(b) cases).

ative recommendation, the market reacted accordingly. But mere investor disappointment does not *ipso facto* imply fraud.

Neither, in our view, does the content of the FDA staff reports suggest fraud. Defendants rely on a handful of words in those reports: to wit, "not valid," "unclear," and "not convincing." (JA 666, 631, 472.) But the staff reports span over 250 pages of highly complex scientific and statistical analysis. These few words and phrases, lacking in accusatory intent and buried like needles in a haystack, could not give rise to storm warnings of fraud.[6]

The Advisory Committee meeting and concomitant negative recommendation also could not give rise to storm warnings of fraud; indeed, the transcript of the Advisory Committee meeting explicitly supports a finding that the experts believed that the dispute between defendants and the FDA was a good faith, legitimate scientific dispute. We note, for example, the following statements made at the Advisory Committee meeting:

> [FDA Representative]: Just to add a couple of other comments to that, . . . I don't think that there were differences between us and the company that were meaningful in terms of the findings of the analyses that were done.
>
> We spent more time describing certain analyses and the company spent more time describing other analyses, but I don't think there is any dispute that we have with what the company presented, and I think that the company understands where we were coming from with our

---

[6] Additionally, one of the staff reports described the disputed six-month model as a "potentially supportive analysis." (JA 482.)

> analyses, and I don't think that they are off target either in terms of how the company sees them.

(*Id.* at 1189.)

> [Advisory Committee Consultant]: The challenge here for me is that it seems to me *everybody is speaking truth*. I agree with everyone who speaks. I agree with the sponsor and their emphasis, I agree with the FDA in their description . . . . It depends on which piece of this you pick out.

(*Id.* at 1154 (emphasis added).)

As should be evident by these statements, the Advisory Committee simply did not believe that anything untoward had occurred, and we obviously will not expect more of the reasonable investor than we would expect of experts on the FDA's Advisory Committee.

Arguably the most troublesome pieces of evidence came in the form of two analyst reports discussing the events at the FDA: a JP Morgan report stated that the use of the truncated data was "unjustified and invalid," and Bloomberg News stated that defendants could only show a benefit "by looking at selected parts of the data—a practice discouraged by the [FDA]." (*Id.* at 714, 719.) Yet even in conjunction with the other evidence to which defendants point, we simply cannot conclude that these statements would alert a reasonable investor that *fraud*, as opposed to a mere disagreement over the best method of scientific analysis, had occurred.

Defendants also argue that storm warnings existed by February 2001 because no new information was revealed at that time or later: it was always known that the CLASS study lasted longer than six months.

But while defendants had acknowledged in April 2000 that the study lasted 13 months, there was no indication that they deliberately withheld data from JAMA, or improperly massaged the data, until the Washington Post article in August 2001. The mere fact that the study lasted thirteen months, and that there was a technical dispute between scientists about whether to use the full data or only a portion of the data, would not have provided storm warnings of fraud to the reasonable investor.[7]

Finally, defendants' own reassuring statements after the Advisory Committee meeting foreclose their argument here. In reaction to the Advisory Committee's negative recommendation, defendants defended the results of the CLASS study, and their use of the truncated data. Defendants stated that they had a "compelling case" for a label change, and that it had been "difficult for the [Advisory Committee] to analyze" the study because it was "an extremely rigorous and complex trial." (*Id.* at 171, 1519.)

These reassuring statements operate as a sort of antidote to any storm warnings that may have existed. *See, e.g., Merck*, 543 F.3d at 167 n.14 ("We have recognized that reassurances can dissipate apparent storm warnings if an investor of ordinary intelligence would reasonably rely on them to allay the investor's concerns.") (internal citations and quotations omitted). Just as we require investors to act upon public information indicating fraud, so, too,

---

[7] In a different context in this litigation, even defendants' counsel acknowledged as much: "Well, what does that show? That scientists can disagree on how you interpret the data. That doesn't make fraud. That means people have different interpretations." (JA 2028 (argument in opposition to class certification).)

do we allow them to rely upon corporate statements discounting the possibility of malfeasance.[8]

The totality of the evidence in the public realm as of February 2001 did not indicate a possibility of fraud or even hint at any malfeasance or intentional impropriety; rather, the evidence only supported the view that there existed a legitimate dispute over scientific and statistical models.[9] But for inquiry notice of § 10(b) claims, we require some reason to suspect that defendants did not genuinely believe the accuracy of their statements. No such evidence surfaced until the publication of the Washington Post article which stated that defendants withheld data from JAMA.

We conclude that investors are not put on inquiry notice of fraud when, in the context of this case, an

---

[8] Corporations are, of course, unlikely to admit to culpable conduct, and we do not purport to state a rule that precludes a finding of inquiry notice until they do so. But, under circumstances such as these, where the evidence of wrongdoing is entirely speculative, reassuring statements are a relevant consideration.

[9] Indeed, after the events of February 2001, reports portrayed Celebrex's outlook positively, and took seriously defendants' truncated analysis. (*See, e.g.*, JA 716 (JP Morgan analysis stating there is some "support[] [for Pharmacia's] contention that there was a [justified reason to limit the analysis to six months], but the FDA statisticians dispute this"); *id.* at 1707-08 (calling "the scientific evidence on this question . . . unclear").)

Additionally, numerous financial analysts retained Pharmacia's stock at a "buy" or "strong buy" rating. *See Merck*, 543 F.3d at 157-58 (noting that, during the relevant period, "securities analysts were of one voice in their projections for Merck and Vioxx; . . . all maintained their ratings for Merck stock at 'buy' or 'hold' and/or continued to project increased future revenues for Vioxx").

apparently legitimate scientific dispute arises between the FDA and a pharmaceutical company, and note that the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4, itself suggests this conclusion. A rule that would place investors on inquiry notice of fraud the moment that the FDA questions the seemingly good faith scientific analysis of a pharmaceutical company would encourage putative plaintiffs to file premature securities suits. In imposing heightened pleading requirements, Congress evinced an intent to discourage such suits; our inquiry notice jurisprudence reflects this intent.

For inquiry notice to take hold, there must be some indicia of potential malfeasance. Because no such indicia existed here, we will vacate the District Court's grant of summary judgment.[10]

B. Length of the Class Period

Largely for the reasons discussed above, we also find that the District Court erred in terminating the class period in February 2001. Particularly in light of defendants' repeated defense of the CLASS study and their optimism regarding a potential label change, it was reasonable for plaintiffs to rely upon defendants' statements until the publication of the Washington Post article on August 5, 2001.[11] *Cf. Basic, Inc. v. Le-*

---

[10] We note that inquiry notice—in securities fraud suits and otherwise—is alive and well in this Court. Neither in *Merck* nor here have we replaced inquiry notice with an actual notice standard. Here, we merely conclude that, in the absence of any indication that defendants did not believe the truth of their own statements, investors were not on inquiry notice of § 10(b) claims.

[11] The appropriate date is August 5, 2001, and not the later date, May 31, 2002, of the British Medical Journal article. As of August 5, 2001, investors should have known that there was a

vinson, 485 U.S. 224 (1988) (outlining presumption of reliance in fraud-on-the-market securities suits). Accordingly, we will reverse the Court's order limiting the class period to February 5, 2001.[12]

C. Cross-Appeal

1. Motion to Dismiss

The District Court correctly denied defendants' motion to dismiss. In that motion, defendants asserted that plaintiffs failed to meet the pleading requirements of the PSLRA, focusing on the admittedly thin two paragraphs of the Amended Complaint labeled "Scienter Allegations." (JA 270-71.) When examined as a whole, however, the Amended Complaint is replete with allegations that defendants acted with the requisite scienter. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 2499, 2509 (2007) (requiring courts to "consider the complaint in its entirety"). In particular, the Amended Complaint documents the alleged scheme to trick JAMA, and thus the investment community, by using only the truncated data.

---

possibility that defendants' claims were false. Any new information found in the British Medical Journal article is different in only degree, and not in kind.

[12] Plaintiffs also challenge the District Court's decision to seal the record and presumably our decision to continue the seal pending appeal. We will leave the question of continued sealing to the District Court. We note, however, that we are unpersuaded by the Court's reliance on the so-called "self-critical analysis privilege" as a basis for sealing. The self-critical analysis privilege has never been recognized by this Court and we see no reason to recognize it now. *Cf. Union Pac. R.R. Co. v. Mower*, 219 F.3d 1069, 1076 n.7 (9th Cir. 2000) (calling the privilege "novel," and noting that the Ninth Circuit has not recognized the privilege).

While it is true that a legitimate disagreement over scientific data does not give rise to a securities fraud claim, plaintiffs alleged something quite different: a bad faith misrepresentation of scientific data. Those allegations are sufficient to withstand the "[e]xacting pleading requirements" of the PSLRA, which require that the allegations give rise to a strong inference of scienter. *See, e.g., Tellabs, Inc.*, 127 S. Ct. at 2504-10. The District Court correctly denied defendants' motion to dismiss.

2. Class Certification

Defendants also argue that the District Court's decision to grant plaintiffs' motion for class certification was in error. The gravamen of this argument is that the results of the CLASS study were immaterial as a matter of law in light of the lack of movement in stock price following the initial release of those results in April 2000. We disagree.

Plaintiffs' own expert acknowledges that the announcement of the results of the CLASS study "had little measurable effect on [Pharmacia's] stock price." (JA 1298.) But that fact does not negate a finding of materiality when the market was *expecting* that the results of the study would be positive, and plaintiffs have presented evidence indicating precisely that. (*See id.* (citing Morgan Stanley report written the day after the CLASS study results were released that states, "we are making no change to our forecasts, as we had anticipated the study to corroborate the strong safety profile of the product").) And, of course, the materiality of the alleged misrepresentations is self-evident when we look at the market's negative reaction—to the tune of a nine-percent drop in stock

price in three days—when defendants' analysis of the CLASS study was questioned in February 2001.[13]

V. Conclusion

For the foregoing reasons, we will vacate the judgment of the District Court, and remand for proceedings consistent with this Opinion.

---

[13] We also reject, without further discussion, defendants' argument that the District Court erred in denying their motion to strike certain documents.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 07-4500 & 07-4564

ALASKA ELECTRICAL PENSION FUND; CITY OF SARASOTA FIREFIGHTERS' PENSION FUND; INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 132 PENSIONPLAN; NEW ENGLAND HEALTH CARE EMPLOYEES PENSION FUND; PACE INDUSTRY UNION-MANAGEMENT PENSION FUND; CHEMICAL VALLEY PENSION FUND OF WEST VIRGINIA, as Class Representatives, on behalf of themselves and all other similarly situated

v.

PHARMACIA CORPORATION; PFIZER, INC.; FRED HASSAN; DR. G. STEVEN GEIS; CARRIE COX

Alaska Electrical Pension Fund; City of Sarasota Firefighters' Pension Fund; International Union of Operating Engineers Local 132 Pension Plan; New England Health Care Employees Pension Fund; Pace Industry Union-Management Pension Fund; Chemical Valley Pension Fund of West Virginia,

Appellants in 07-4500

Pharmacia Corporation; Pfizer, Inc.; Fred Hassan; Dr. G. Steven Geis; Carrie Cox,

Appellants in 07-4564

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil Nos. 3-03-cv-01519, 3-03-cv-01691, 3-03-cv-01808, 3-03-cv-01964, 3-03-cv-02149, 3-03-cv-02283)
District Judge: The Honorable Anne E. Thompson

Present: SCIRICA, *Chief Judge*, SLOVITER, BARRY, AMBRO, FISHER, CHAGARES, and JORDAN, *Circuit Judges*, and RESTANI,* *Judge*

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing en banc filed by Appellees/Cross-Appellants having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing en banc is DENIED.

BY THE COURT:

/s/ Maryanne Trump Barry
Circuit Judge

Dated: 3 March 2009

---

* Honorable Jane A. Restani's, Chief Judge, United States Court of International Trade, vote is limited to panel rehearing only.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Filed 10/30/2007]

ALASKA ELECTRICAL PENSION FUND, *et al.*,

Plaintiffs,

v.

PHARMACIA CORPORATION, *et al.*,

Defendants.

Civil No. 03-1519 (AET).

MEMORANDUM AND ORDER

THOMPSON, U.S.D.J.

INTRODUCTION

This matter comes before the Court on behalf of Defendants Pharmacia Corporation ("Pharmacia"), Pfizer, Inc., Fred Hassan, Dr. G. Steven Geis, and Carrie Cox's (collectively, "Defendants") Motion for Summary Judgment [145]. The Court has decided this motion based upon the submissions and oral arguments of the parties on September 12, 2007. For the reasons stated below, Defendants' motion is granted.

BACKGROUND

A. Procedural Background

This case arises from Defendants' effort to remove the standard gastrointestinal ("GI") warning on the

label of the drug Celebrex. On April 7, 2003, Plaintiffs filed a complaint alleging that Defendants violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder, by misrepresenting the results of a clinical study of Celebrex. On January 25, 2007, the Court certified a class consisting of purchasers of Pharmacia common stock during the period of April 17, 2000 to February 6, 2001. On May 31, 2007, Defendants filed a Motion for Summary Judgment claiming that Plaintiffs' complaint is time-barred.

B. Factual Background

From approximately September 1998 to March 2000, Pharmacia commissioned a clinical study of Celebrex entitled, The Celecoxib Long-Term Arthritis Safety Study ("CLASS"), to support an application to the Food and Drug Administration ("FDA"), that sought to remove the standard GI warning from its label. (*See* Declaration of William A. Dreier ("Dreier Decl."), Ex. 2 at 1247.)

On approximately June 12, 2000, Pharmacia submitted all of the data from CLASS to the FDA to support its application. (Dreier Decl., Ex. 11.) In addition, Pharmacia included "Briefing Documents," setting forth its own analysis of the data from CLASS, and recommending that the FDA analyze only results from the first six months of the study ("six-month analysis"), rather than the results from the entire thirteen-month study. (Dreier Decl., Ex. 13 at 1; *id.*, Ex. 14 at 1.)

On September 13, 2000, the results of CLASS were published in the Journal of the American Medical Association ("JAMA") (*Id.*, Ex. 1 ¶ 45; *id.*, Ex. 2.) However, only the results from the six-month analy-

sis were published in the JAMA article, results that were favorable to Pharmacia. (*Id.*, Ex. 2 at 1253-54.) Moreover, it was Defendants who supplied JAMA with information on CLASS, and thus, were largely responsible for the contents of the article.

On February 6, 2001, the FDA posted the Briefing Documents submitted by Pharmacia to its website. The FDA also posted reports ("FDA Staff Reports") by two medical officers and a statistician. These reports analyzed the CLASS data from the entire thirteen-month study submitted to the FDA. *See* http://www.fda.gov/ohrms/dockets/ac/01/briefing/3677b1.htm (last visited Oct. 25, 2007). On February 7, 2001, both the Briefing Documents and FDA Staff Reports were available to the public on the FDA website. *Id.* The reports concluded that using data from only the first six months, as opposed to the entire thirteen-month study, was "not valid" and "not convincing," and opined that "the most critically relevant analysis covers the complete study period." (Dreier Decl., Ex. 15 at 8-9; *id.*, Ex. 13 at 14, 24.)

On February 7, 2001, an advisory committee, comprising FDA-appointed independent experts ("Arthritis Advisory Committee"), held a public hearing to consider Pharmacia's request to remove or modify the standard GI warning from the Celebrex label. (Dreier Decl., Ex. 21.) The Arthritis Advisory Committee recommended that the standard GI warning remain. (*Id.*) The decision and impact of the hearing were widely reported in analyst reports and the media on, and after, February 7, 2001.

On August 5, 2001, the Washington Post published an article stating that Defendants had deceived JAMA into publishing an article containing incomplete data. (Dreier Decl., Ex. 44.) The article stated

that Defendants did not provide JAMA with any of the negative post-six-month CLASS data. (*Id.*)

APPLICABLE LAW

A. Standard for Summary Judgment

A party seeking summary judgment must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1366 (3d Cir. 1996).

In deciding whether there is a disputed issue of material fact, the Court must view the underlying facts and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Pennsylvania Coal Ass'n v. Babbitt*, 63 F.3d 231, 236 (3d Cir. 1995); *Hancock Indus. v. Schaeffer*, 811 F.2d 225, 231 (3d Cir. 1987). The threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (noting that no issue for trial exists unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict in its favor).

In deciding whether triable issues of fact exist, Rule 56(e) of the Federal Rules of Civil Procedure provides, in relevant part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allega-

> tions or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e). The rule does not increase or decrease a party's ultimate burden of proof on a claim. Rather, "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." *Anderson,* 477 U.S. at 255.

The nonmoving party must "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex,* 477 U.S. at 324; *see also Lujan v. National Wildlife Fed.,* 497 U.S. 871, 888 (1990) ("[T]he object of [Rule 56(e)] is not to replace conclusory allegations of the complaint . . . with conclusory allegations of an affidavit"); *Anderson,* 477 U.S. at 249; *Big Apple BMW, Inc. v. BMW of N. Am., Inc.,* 974 F.2d 1358, 1363 (3d Cir. 1992) ("to raise a genuine issue of material fact . . . the [nonmoving party] need not match, item for item, each piece of evidence proffered by the movant," but rather must exceed "the 'mere scintilla' threshold"), *cert. denied,* 507 U.S. 912 (1993).

B. Statute of Limitations and the Standard for Inquiry Notice

A claim for securities fraud under Sections 10(b) and 20(a) of the Exchange Act must be brought no later than the earlier of "(1) two years after the

discovery of the facts constituting the violation, or (2) five years after such violation." 28 U.S.C. § 1658(b). The triggering of the "two years after discovery of the facts" prong is based on an inquiry notice standard. In this case, the "two year after the discovery of the facts" prong of the statute is controlling, as inquiry notice under both parties' arguments would be found before the alternate five-year limitation.

Inquiry notice is found "whenever circumstances exist that would lead a reasonable investor of ordinary intelligence, through the exercise of reasonable diligence, to discover his or her injury." *Mathews v. Kidder, Peabody & Co.*, 260 F.3d 239, 251 (3d Cir. 2001). It is not necessary for a plaintiff to have "actual knowledge or know all of the details of the alleged fraud to trigger the [running of the] limitations period." *In re Merck & Co. Sec., Deriv & "ERISA" Litig.*, MDL No. 1658, C.A. Nos. 05-1151, 2007 WL 1100820, at *10 (D.N.J. Apr. 12, 2007) (citing *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1325 (3d Cir. 2002)).

To determine inquiry notice, the Court looks to see if plaintiffs had sufficient information to excite "storm warnings" of culpable activity. "Storm warnings" include "the accumulation of information over a period of time that conflicts with representations that were made when the securities were originally purchased, or any financial, legal, or other data that would alert a reasonable person to the probability that misleading statements or significant omissions had been made." *In re NAHC*, 306 F.3d at 1326 n.5. The existence of "storm warnings" is an objective inquiry. *Mathews*, 260 F.3d at 252 ("Plaintiffs need not be aware of the suspicious circumstances or understand their import. It is enough that a reasona-

ble investor of ordinary intelligence would have discovered the information and recognized it as a storm warning"). Plaintiffs need not know all of the details or narrow aspects of the alleged fraud to trigger the limitations period; instead, the period begins to run from the "time at which plaintiff should have discovered the general fraudulent scheme." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 975 F. Supp. 584, 599 (D.N.J. 1997).

The defendants bear the initial burden of showing the existence of storm warnings. *Mathews,* 260 F.3d at 252. Once storm warnings rise to inquiry notice and trigger the statute of limitations, plaintiffs must investigate the basis for their claims. *In re NAHC,* 306 F.3d at 1326. If a defendant succeeds in establishing inquiry notice, the "burden shifts to the plaintiffs to demonstrate that they were unable to discover their injuries despite the exercise of reasonable due diligence." *In re Merck,* 2007 WL 1100820, at *10. If a plaintiff's claims are time-barred under the inquiry notice standard, then summary judgment in favor of the defendant is appropriate. *See Mathews,* 260 F.3d at 250.

DISCUSSION

Defendants argue that Plaintiffs were on inquiry notice no later than February 7, 2001. Therefore, since Plaintiffs' complaint was filed on April 7, 2003, it is time-barred under the two-year statute of limitations set forth in 28 U.S.C. § 1658(b). In support, Defendants assert that the February 7, 2001 postings of the Briefing Documents and the FDA Staff Reports on the FDA website, the Arthritis Advisory Committee public hearing, and widespread media and financial analyst coverage of these materials and proceedings, constituted "storm warnings" that placed Plain-

tiffs on inquiry notice of Defendants' alleged misrepresentations.

The Briefing Documents published on the FDA website, presented several analyses of the CLASS data, including: (1) an analysis as specified in the original study protocol, that is, based upon data from the entire study period and the original primary endpoint, and (2) an alternative analysis based upon six-months of data favored by Pharmacia. (Dreier Decl., Ex. 12.) However, the FDA Staff Reports posted on the FDA's website on February 7, 2001, disagreed with the alternative analysis set forth in the Briefing Documents, and opined that "the most critically relevant analyses covers the complete study period as specified in the original protocol." (Dreier Decl., Ex. 15; *id.*, Ex. 13.)

Further, the Arthritis Advisory Committee hearing on February 7, 2001, reiterated that the complete study period was the proper analysis, and recommended that the standard GI warning remain on the Celebrex label. (Dreier Decl., Ex. 22 at 1.) Moreover, the information on the FDA website, and the Arthritis Advisory Committee's decision was widely reported in analyst reports and the media. By way of example, but not exhaustive, analysts and media reported as follows[1]

---

[1] *See also* February 6, 2001, *Reuters News Service*, "Celecoxib did not demonstrate statistically superiority to NSAIDS . . . at any point in the trial." (Dreier Decl., Ex. 18.); February 8, 2001, *Chicago Tribune* article entitled "Tests Fail to Show Celebrex Drug Safer Than Rivals," ("committee members said they saw no edge for Celebrex over treatments such as ibuprofen when comparing rates of the most serious ulcers.") (*Id.*, Ex. 23.); February 7, 2001, *Reuters News Service*, "There is no clinically meaningful safety advantage in upper (gastrointestinal) safety."

- February 6, 2001, *Bloomberg News* article entitled "Pharmacia Hasn't Shown Celebrex Safety Benefit, FDA Review Says"

  > Only by looking at selected parts of the data—a practice discouraged by the agency—was the company able to show a benefit, the reviewers said. (Dreier Decl., Ex. 17.)

- February 7, 2001, *Star-Ledger* article entitled "Firms Await FDA Word on 2 Rival Painkillers"

  > FDA documents released yesterday in advance of the [advisory committee] meeting showed an agency review of Celebrex found the drug isn't significantly less likely to cause stomach problems than the older, cheaper painkillers. (Dreier Decl., Ex. 20.)

(*Id.*, Ex. 25.); February 8, 2001, *Washington Post*, "There's no proof that-much promoted arthritis drug Celebrex is gentler on the stomach than older, cheaper painkillers, the government's scientific advisors decided." (*Id.*, Ex. 27.); February 8, 2001, *Orlando Sentinel* article entitled "Celebrex Fails to Impress." (*Id.*, Ex. 29.); February 8, 2001, *Milwaukee Journal Sentinel*, "the ruling was a blow to manufacturer Pharmacia Corp., which had hoped the advisors would recommend that the [FDA] quit requiring that Celebrex bear a warning that users risk ulcers." (*Id.*, Ex. 30.); February 8, 2001, *Asbury Park Press* article entitled "FDA Disputes Arthritis Drug Claim." (*Id.*, Ex. 31.); February 8, 2001, *CBS Marketwatch.com*, "a panel found that Pharmacia couldn't show that Celebrex cause fewer gastrointestinal side effects than pain relievers of another class of treatments." (*Id.*, Ex. 32.); February 9, 2001, *CNBC Market Week With Maria Bartiromo*, "Pharmacia was really beaten back this week by a setback from the FDA on a labeling issue." (*Id.*, Ex. 35.); February 9, 2001, *Pittsburgh Post-Gazette* article entitled "FDA Rules Agaist Vioxx, Celebrex Labels." (*Id.*, Ex. 36.); February 9, 2001, *Salt Lake Tribune* article entitled "FDA Says Celebrex Not Easier On Stomach." (*Id.*, Ex. 37.)

- February 7, 2001, *J.P. Morgan Analyst Report*, entitled "FDA Review of Celebrex More Negative Than Expected-Panel Could be Controversial"

  > The four main issues raised by the FDA are: (1) Pharmacia's analysis of data at only the 26-week time point, rather than the 52-week time point, is unjustified and invalid (and the data is even less robust at 52 weeks) (Dreier Decl., Ex. 16.)

- February 7, 2001, *Philadelphia Inquirer* article entitled "FDA Report Questions Claims about Celebrex Painkiller"

  > A Food and Drug Administration advisory report said Pharmacia Corp. had not shown that its Celebrex painkiller was less likely to cause stomach bleeding than the older treatments . . . [t]he FDA review of a trial of Celebrex could mean problems for Pharmacia today when it asks and FDA advisory panel to endorse claims that the drug is safer than traditional painkillers. (Dreier Decl., Ex. 19.)

In contrast, Plaintiffs argue that the statute of limitations period does not begin to run until plaintiffs have notice that the defendants acted with the requisite scienter. (Pls.' Opp'n. 21.) Plaintiffs assert that requisite scienter was not shown until August 5, 2001, when the Washington Post article was published. Therefore, Plaintiffs claim that they were not on inquiry notice until August 5, 2001. Under Plaintiffs' theory, their complaint was filed well within the two-year statute of limitations. However, the Court finds this argument untenable. Inquiry notice exists when Plaintiffs discovered, or in the exercise of reasonable diligence, should have discovered the gen-

eral fraudulent scheme. *In re NAHC,* 306 F.3d at 1326. Plaintiffs need not have discovered the precise profile of the alleged fraud, nor been prepared to draft a complaint for a lawsuit at the time inquiry notice arises. *Id.* at 1327. So long as sufficient "storm warnings" are on the horizon, inquiry notice may be found to exist.

Additionally, Plaintiffs argue that "[D]efendants' public, reassuring statements justifying the six-month analysis prevented plaintiffs from being put on inquiry notice." (Pls.' Opp'n. 28.) However, the Court is not persuaded that assurances from Defendants in the months before and after the publication of the Briefing Documents, the FDA Staff Reports, and the Arthritis Advisory Committee public hearing, counterbalanced and offset the storm warnings. Although reassurances given by a company may dissipate storm warnings, an investor may not reasonably rely on words of comfort from management "when there are direct contradictions between the defendants' representations and the other materials available to plaintiffs regarding the possibility of fraud." *In re Exxon Mobile Corp. Sec. Litig.*, 387 F. Supp. 2d 407, 418 (D.N.J. 2005).

The Court determines that there were sufficient "storm warnings" no later than February 9, 2001, to place Plaintiffs on inquiry notice. A reasonable investor would have discovered this public, company-specific information, and recognized it as storm warnings. The February 7, 2001 publications of the Briefing Documents, the FDA Staff Reports on the FDA website, the FDA Arthritis Advisory Committee public hearing, and the media and financial analyst coverage of these materials and proceedings, consti-

tuted storm warnings sufficient to place Plaintiffs on inquiry notice of their claims.

Plaintiffs' complaint is time-barred as it was brought on April 7, 2003, more than two years after Plaintiffs were on inquiry notice. Therefore, Defendants' Motion for Summary Judgment is granted.

CONCLUSION

For the reasons given above, and for good cause shown,

It is on this 29th day of October 2007,

ORDERED that Defendants' Motion for Summary Judgment [145] is GRANTED; and it is further

ORDERED that Plaintiffs' Motion to Seal [150] is DENIED as moot; and it is further

ORDERED that Plaintiffs' Motion to Strike [151] is DENIED as moot; and it is further

ORDERED that Defendants' Motion to Seal [155] is DENIED as moot; and it is further

ORDERED that Defendants' Motion to Strike [156] is DENIED as moot; and it is further

ORDERED that Defendants' Cross-Motion to Strike [157] is DENIED as moot; and it is further

ORDERED that Plaintiffs' Motion to Seal [162] is DENIED as moot; and it is further

ORDERED that Defendants' Motion to Seal [166] is DENIED as moot; and it is further

ORDERED that Plaintiffs' Motion to Seal [168] is DENIED as moot; and it is further

ORDERED that Plaintiffs' Motion for Leave to Appear Pro Hac Vice [174] is DENIED as moot; and it is further

ORDERED that this case is closed.

s/ Anne E. Thompson
ANNE E. THOMPSON, U.S.D.J.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Filed 05/20/2004]

ROBERT L. GARBER, *et al.*,

Plaintiffs,

v.

PHARMACIA CORP., *et al.*,

Defendants.

Civil No. 03-1519 (AET)

ORDER

THOMPSON, U.S.D.J.

This matter comes before the Court on the motion of Defendants to dismiss this action pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6), and on the motion of Plaintiffs to strike certain exhibits attached to Defendants' motion to dismiss; and the Court, having reviewed the submissions of the parties and having heard oral argument on May 17, 2004, and for good cause shown,

It is on this 19th day of May, 2004,

ORDERED that Defendants' motion to dismiss is DENIED; and it is further

ORDERED that Plaintiffs' motion to strike is DENIED.

s/ Anne E. Thompson
ANNE E. THOMPSON, U.S.D.J.

APPENDIX E

TITLE 15—COMMERCE AND TRADE

CHAPTER 2B—SECURITIES EXCHANGES

Sec. 78u-4. Private securities litigation

* * *

(b) Requirements for securities fraud actions

* * *

(2) Required state of mind

In any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

(June 6, 1934, c. 404, Title I, § 21D, as added and amended Dec. 22, 1995, Pub. L. 104-67, Title I, § 101(b), Title II, § 201(a), 109 Stat. 743, 758; Nov. 3, 1998, Pub. L. 105-353, Title I, § 101(b)(2), Title III, § 301(b)(13), 112 Stat. 3233, 3236.)

APPENDIX F

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

PART V—PROCEDURE

CHAPTER 111—GENERAL PROVISIONS

Sec. 1658. Time limitations on the commencement of civil actions arising under Acts of Congress

* * *

(b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of—

(1) 2 years after the discovery of the facts constituting the violation; or

(2) 5 years after such violation.

(Added Pub. L. 101-650, Title III, § 313(a), Dec. 1, 1990, 104 Stat. 5114, and amended Pub. L. 107-204, Title VIII, § 804(a), July 30, 2002, 116 Stat. 801.)

No. 08-1315

FILED
JUN 25 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

PHARMACIA CORPORATION, PFIZER, INC., FRED HASSAN, G. STEVEN GEIS and CARRIE COX,
Petitioners,

v.

ALASKA ELECTRICAL PENSION FUND, CITY OF SARASOTA FIREFIGHTERS' PENSION FUND, INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 132 PENSION PLAN, NEW ENGLAND HEALTH CARE EMPLOYEES PENSION FUND, PACE INDUSTRY UNION-MANAGEMENT PENSION FUND and CHEMICAL VALLEY PENSION FUND OF WEST VIRGINIA, as Class Representatives, On Behalf of Themselves and All Others Similarly Situated,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PETER S. PEARLMAN
COHN LIFLAND PEARLMAN HERRMANN & KNOPF LLP
Park 80 Plaza West-One
Saddle Brook, NJ 07663
(201) 845-9600

ERIC ALAN ISAACSON
Counsel of Record
ARTHUR C. LEAHY
MATTHEW P. MONTGOMERY
COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP
655 West Broadway
Suite 1900
San Diego, CA 92101
(619) 231-1058

Counsel for Respondents

[Additional Counsel Listed on Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

JOSEPH F. RICE
ANN K. RITTER
GREGG S. LEVIN
JOSH LITTLEJOHN
MOTLEY RICE LLC
28 Bridgeside Blvd.
Mt. Pleasant, SC 29464
(843) 216-9000

QUESTIONS PRESENTED

Whether the Third Circuit erred in finding, consistent with authority from this Court and precedent from other Courts of Appeals, that investors are not placed on inquiry notice of the facts constituting a Securities Exchange Act of 1934 §10(b) securities-fraud violation by publically-available facts suggesting a good-faith disagreement over scientific methodology.

Whether the Third Circuit failed to engage in the analysis required by *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007), when it held that the Amended Complaint, examined as a whole, pleads facts raising a strong inference of deliberate misconduct that is cogent and at least as compelling as any competing inference.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF THE CASE	4
A. Facts	4
B. Proceedings Below	8
REASONS FOR DENYING THE WRIT	10
A. The Decision Below Comports with the Plain Language of §1658(b)	11
B. Petitioners Have Not Identified a Genuine Conflict Among the Circuits with Respect to Inquiry Notice	13
C. The Lower Courts Uniformly Require that Facts Available to an Investor Suggest Wrongdoing to Create Inquiry Notice of §10(b) Claims	17
D. The Decision Below Does Not Thwart the Purpose of Inquiry Notice	24
E. Petitioners Misconstrue *Basic v. Levinson*	26
F. The Third Circuit Applied *Tellabs* to Petitioners' Motion to Dismiss	30
CONCLUSION	32

TABLE OF AUTHORITIES

CASES Page

Aaron v. SEC, 446 U.S. 680 (1980) ..... *passim*
Basic Inc. v. Levinson, 485 U.S. 224 (1988) ..... *passim*
Benak v. Alliance Capital Mgmt. L.P., 435 F.3d 396 (3d Cir. 2006) ..... *passim*
Berry v. Valence Tech., Inc., 175 F.3d 699 (9th Cir. 1999) 15, 20, 21, 22-23
Betz v. Trainer Wortham & Co., 519 F.3d 863 (9th Cir. 2008), *pet. for cert. filed*, No. 07-1489 (May 27, 2008) ..... *passim*
Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975) 29
Bradley v. Nat'l Ass'n of Sec. Dealers Dispute Resolution, 433 F.3d 846 (D.C. Cir. 2005) 15
Cooke v. Manufactured Homes, Inc., 998 F.2d 1256 (4th Cir. 1993) 14
Davis v. Grusemeyer, 996 F.2d 617 (3d Cir. 1993) 23-24
DeBenedictis v. Merrill Lynch & Co., 492 F.3d 209 (3d Cir. 2007) 15
Dura Pharms., Inc. v. Broudo, 544 U.S. 336 (2005) 2, 16
Durham v. Business Mgmt. Assocs., 847 F.2d 1505 (11th Cir. 1988) 12
Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) 2, 18
Fujisawa Pharm. Co. v. Kapoor, 115 F.3d 1332 (7th Cir. 1997) 14, 17, 21, 22
GFL Advantage Fund, Ltd. v. Colkitt, 272 F.3d 189 (3d Cir. 2001) 16
Goldenberg v. Bache & Co., 270 F.2d 675 (5th Cir. 1959) 12

TABLE OF AUTHORITIES—Continued

Page

Gray v. First Winthrop Corp., 82 F.3d 877 (9th Cir. 1996) 15

Great Rivers Coop. v. Farmland Indus., 120 F.3d 893 (8th Cir. 1997) 15, 24

Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) 18

Jensen v. Snellings, 841 F.2d 600 (5th Cir. 1988) 12

Johns Hopkins Univ. v. Hutton, 488 F.2d 912 (4th Cir. 1973) 12

La Grasta v. First Union Sec., Inc., 358 F.3d 840 (11th Cir. 2004) 19

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991) 11

LaSalle v. Medco Research, 54 F.3d 443 (7th Cir. 1995) 14-15

Law v. Medco Research, 113 F.3d 781 (7th Cir. 1997) 12, 13, 22, 26

LC Capital Partners, L.P. v. Frontier Ins. Group, Inc., 318 F.3d 148 (2d Cir. 2003) .. 14

Lentell v. Merrill Lynch & Co., 396 F.3d 161 (2d Cir. 2005) 21, 23, 26

Levitt v. Bear Stearns & Co., 340 F.3d 94 (2d Cir. 2003) 26

Marks v. CDW Computer Ctrs., 122 F.3d 363 (7th Cir. 1997) 15, 25

Mathews v. Kidder, Peabody & Co., 260 F.3d 239 (3d Cir. 2001) 22, 25

In re Merck & Co., Inc. Sec. Derivative & ERISA Litig., 543 F.3d 150 (3d Cir. 2008) 22, 25-26

Mosesian v. Peat, Marwick, Mitchell & Co., 727 F.2d 873 (9th Cir. 1984) 24

TABLE OF AUTHORITIES—Continued

Page

In re NAHC, Inc., Sec. Litig., 306 F.3d 1314 (3d Cir. 2002) 15, 21
Nevada Power Co. v. Monsanto Co., 955 F.2d 1304 (9th Cir. 1992) 15
New England Health Care Employees Pension Fund v. Ernst & Young, LLP, 336 F.3d 495 (6th Cir. 2003) ..... *passim*
Newman v. Warnaco Group, Inc., 335 F.3d 187 (2d Cir. 2003) 23
Olcott v. Delaware Flood Co., 76 F.3d 1538 (10th Cir. 1996) 24
Realmonte v. Reeves, 169 F.3d 1280 (10th Cir. 1999) 21
Rex v. De Berenger, 3 M. & S. 67, 105 Eng. Rep. 536 (1814) 28
Ritchey v. Horner, 244 F.3d 635 (8th Cir. 2001) 22, 24
Rothman v. Gregor, 220 F.3d 81 (2d Cir. 2000) 21
Schellenbach v. SEC, 989 F.2d 907 (7th Cir. 1993) 16
SEC v. Blavin, 760 F.2d 706 (6th Cir. 1985) 16
SEC v. Rana Research, 8 F.3d 1358 (9th Cir. 1993) 16
SEC v. Tambone, 550 F.3d 106 (11th Cir. 2008) 16
Staehr v. Hartford Fin. Servs. Group, 547 F.3d 406 (2d Cir. 2008) 14
Sterlin v. Biomune Sys., Inc., 154 F.3d 1191 (10th Cir. 1998) ..... *passim*
Sudo Props. v. Terrebonne Parish Consol. Gov't, 503 F.3d 371 (5th Cir. 2007) 14, 22

TABLE OF AUTHORITES—Continued

Page

Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007) ..... *passim*
Tello v. Dean Witter Reynolds, Inc., 410 F.3d 1275 (11th Cir. 2005) ..... *passim*
Tello v. Dean Witter Reynolds, Inc., 494 F.3d 956 (11th Cir. 2007) 15
Theoharous v. Fong, 256 F.3d 1219 (11th Cir. 2001) 18, 19
TSC Indus. v. Northway, Inc., 426 U.S. 438 (1976) 24
United States v. Brown, 5 F. Supp. 81 (S.D.N.Y. 1933), *aff'd*, 79 F.2d 321 (2d Cir. 1935) 28
Volk v. D.A. Davidson & Co., 816 F.2d 1406 (9th Cir. 1987) 15
Young v. Lepone, 305 F.3d 1 (1st Cir. 2002) ..... *passim*

STATUTES, RULES AND REGULATIONS

SECURITIES EXCHANGE ACT of 1934
§ 9(e), *codified at* 15 U.S.C. §78i(e) 11
§ 10(b), *codified at* 15 U.S.C. §78j(b) ..... *passim*
§ 20(a), *codified at* 15 U.S.C. §78t(a) 8
§ 21D, *codified at* 15 U.S.C. §78u-4(b)(2) .. 30
28 U.S.C.
§1658(b) ..... *passim*
§1658(b)(1) 11, 12, 17, 26
17 C.F.R.
Rule 240.10b-5 ..... 2, 12, 16, 28

TABLE OF AUTHORITES—Continued

SECONDARY AUTHORITIES Page

Adolf A. Berle, Jr., *Liability for Stock Market Manipulation*, 31 Colum. L. Rev. 264 (1931) 27

Adolf A. Berle, Jr., *Stock Market Manipulation*, 38 Colum. L. Rev. 393 (1938) 27

DeAngelis and Fontanarosa, *Impugning the Integrity of Medical Science: The Adverse Effects of Industry Influence*, 299 JAMA 1833 (Apr. 16, 2008) 8

F.A. Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519 (1945) 29

MISCELLANEOUS

Brief for the United States as *Amicus Curiae* in *Trainer Wortham & Co. v. Betz*, No. 07-1489 (U.S. Apr. 22, 2009) 18, 20

IN THE

Supreme Court of the United States

No. 08-1315

PHARMACIA CORPORATION, PFIZER, INC., FRED HASSAN, G. STEVEN GEIS and CARRIE COX,
Petitioners,

v.

ALASKA ELECTRICAL PENSION FUND, CITY OF SARASOTA FIREFIGHTERS' PENSION FUND, INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 132 PENSION PLAN, NEW ENGLAND HEALTH CARE EMPLOYEES PENSION FUND, PACE INDUSTRY UNION-MANAGEMENT PENSION FUND and CHEMICAL VALLEY PENSION FUND OF WEST VIRGINIA, as Class Representatives, On Behalf of Themselves and All Others Similarly Situated,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Under 28 U.S.C. §1658(b), a federal securities-fraud claim must be filed "not later than the earlier of—(1) 2 years after the discovery of the facts consti-

tuting the violation; or (2) 5 years after such violation." 28 U.S.C. §1658(b).

This Court holds that fraudulent intent, or "scienter is an element of a violation of §10(b) and Rule 10b-5, regardless of the identity of the plaintiff or the nature of the relief sought." *Aaron v. SEC*, 446 U.S. 680, 691 (1980); *accord Basic Inc. v. Levinson*, 485 U.S. 224, 240 n.18 (1988) (citing *Aaron*, 446 U.S. at 691); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). Thus, one of the critical facts necessary to constitute any violation of §10(b) of the Securities Exchange Act of 1934 ("1934 Act") is fraudulent intent or scienter. "To establish liability under §10(b) and Rule 10b-5, a private plaintiff must prove that the defendant acted with scienter, 'a mental state embracing the intent to deceive, manipulate, or defraud.'" *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007) (quoting *Ernst & Ernst*, 425 U.S. at 193-94 & n.12); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341 (2005) (§10(b) requires "*scienter*, *i.e.*, a wrongful state of mind") (emphasis in original). As the Third Circuit aptly put it in this case, "[s]cienter is not incidental to §10(b), it is elemental." Pet. App. 13a.

This case is one in which investors who followed Pharmacia might have learned in February 2001 of a technical dispute between the Food and Drug Administration ("FDA") and Pharmacia about the best way to analyze data from a clinical study. But such a dispute does not, by itself, suggest that fraud was afoot. Pet. 28. Petitioners concede as much when they argue that the case should have been dismissed for failure to plead scienter. Pet. 31-32. They insist their misleading statements, when considered in context, "reflected nothing more than a legitimate

interpretation of scientific data, and a scientific dispute over competing interpretations of data cannot give rise to a strong inference of scienter," Pet. 34, and that innocent explanations for their misleading statements "overwhelm any inferences of fraudulent intent." Pet. 6, 31.

In fact, nothing in the public domain suggested fraud to reasonable investors of ordinary intelligence until August 5, 2001, when the *Washington Post* published a story entitled "Missing Data on Celebrex: Full Study Altered Picture of Drug." JA:0203-04. In that article, the public learned for the first time that Petitioners had intentionally withheld critical data from a medical journal's editors and peer reviewers, thereby deliberately misleading the journal, the medical community, and public investors. JA:0203-04. This article was, as the Third Circuit found, the first indication, to reasonable investors of ordinary intelligence, that Petitioners' conduct might involve fraud, and thus Respondents' original complaint, filed less than two years after the article's publication, was timely under §1658(b).

Petitioners identify no material split among the circuits, all of which hold that inquiry notice requires notice of facts suggesting the possibility of fraud. In the absence of a potentially consequential disagreement among the lower courts, there is no need for this Court's review.

Nor is there any reason to review the Third Circuit's determination that, "[w]hen examined as a whole . . . the Amended Complaint is replete with allegations . . . of scienter." Pet. App. 19a (citing and following *Tellabs*, 551 U.S. at 321-23). The Third Circuit explicitly cited and faithfully followed the standard this Court set forth in *Tellabs*.

STATEMENT OF THE CASE

A. Facts

This securities-fraud class action arose because Petitioners materially misrepresented the safety and commercial viability of Pharmacia's blockbuster drug, Celebrex. Specifically, Petitioners misled a leading medical journal and told medical professionals and the investing public that data from a long-term safety study (the "CLASS" study) established Celebrex's superior safety profile. In truth, when the full results were analyzed, the CLASS study showed *no safety advantage* for Celebrex over less-expensive drugs. Petitioners fabricated supposedly favorable study results by arbitrarily restricting analysis to the data from only the first six months of the study.

By truncating the results to six months—as part of a so-called "alternative analysis"—Petitioners made it look as though Celebrex was safer than its comparators. Using these manipulated results, Petitioners touted Celebrex's superiority in a manuscript published by the *Journal of the American Medical Association* ("*JAMA*"), in press releases, conference calls, and presentations at medical conferences throughout the Class Period.

Petitioners tell this Court, "[i]n April 2000, Pharmacia publicly disclosed the results" of the CLASS trial. Pet. 7. But Pharmacia's April 17, 2000, press release was inherently misleading. It stated:

> In a landmark study to assess the overall long-term safety of the COX-2 specific inhibitor Celebrex . . . arthritis patients taking four times the recommended osteoarthritis . . . dose of the drug experienced fewer symptomatic gastrointes-

> tinal . . . ulcers and ulcer complications than patients taking ibuprofen and diclofenac . . . .

JA:0050-55, at 50. Nowhere did Petitioners' press release disclose what later came to light: that the "compelling" findings it described were, in truth, negated by the full study results. Pet. App. 5a.

Petitioners also say that "Pharmacia disclosed that Celebrex failed to meet the objectives of the original CLASS protocol," citing an *analyst's* report that did not even remotely suggest that the ostensibly favorable outcome could be supported only by truncating and manipulating the data. Pet. 7. Much more than merely "suggest[ing] the possible superiority of Celebrex," as Petitioners put it now, Pet. 7, Petitioner Hassan told securities analysts in April 2000: "[W]e now have *exciting new data* that shows that *Celebrex has a truly exceptional safety profile.*" JA:0059 (emphasis added).

Petitioners continue: "In September 2000, *Petitioner Geis and 15 other doctors and scientists not employed by Pharmacia* published an article regarding the results of CLASS in the Journal of the American Medical Association (the '*JAMA* Article')." Pet. 8 (citing JA:0039-47) (emphasis added). In fact, *six* of its sixteen authors were Pharmacia employees, and the rest were Pharmacia's paid consultants.[1] "All

---

[1] JA:0046. The article states:

> Financial Disclosures: Ms Burr and Drs Zhao, Kent, Lefkowith, Verburg and Geis are employees of Pharmacia, manufacturer of celecoxib. In addition, all authors who are not Pharmacia employees are paid consultants for Pharmacia.
>
> Funding/Support: This study was funded by Pharmacia.

Id.

authors," the *Washington Post* subsequently observed, "were either employees of Pharmacia, Celebrex's manufacturer, or paid consultants of the company." JA:0203.

Anxious for a peer-reviewed publication which would, as an FDA official later told the *Washington Post*, "confirm[] the hype," JA:0204, Petitioners deliberately concealed from *JAMA*'s editors the fact that more study data was available than what they sought to publish, and that the full study negated the positive outcome they reported. Pet. App. 5a; JA:2110-2113, at 2111. As a consequence, *JAMA* published the article, which misleadingly described the study and its results, in September 2000. Pet. App. 5a; JA:0039. The article became a key marketing tool in Petitioners' efforts to promote Celebrex and its supposed safety advantage, as Petitioners distributed over 30,000 copies of it. JA:0756-57, at 757; JA:2271.

Petitioners submitted the full CLASS data to the FDA when they asked the agency to remove certain gastrointestinal warnings from Celebrex's label. Pet. App. 5a; JA:2224. Petitioners urged the FDA and its consultants to ignore the data after the six-month timepoint, asserting—falsely—that the later data was unreliable. Pet. App. 6a. Three FDA staff reviewers who examined the full-study data were not persuaded. Pet. App. 6a-7a. On February 6, 2001, the FDA posted both Petitioners' "Briefing Document," which described their "alternative analysis," and the staff reviewers' reports, to its website. Pet. App. 5a-7a. An Advisory Committee—a panel of independent experts whose function is to advise the FDA—met on February 7, 2001, to consider the data, and concluded that it did not warrant Petitioners' requested label change. Pet. App. 7a.

Contemporaneous public debate suggested only an honest disagreement over statistical data and scientific methodology—as Petitioners themselves acknowledge when they argue that the operative complaint fails to allege facts showing fraud. *See* Pet. 28-34. Not until August 5, 2001, when the *Washington Post* article appeared, did reasonable investors of ordinary intelligence have any cause to suspect Petitioners had deliberately concealed information or intentionally misstated the results of the CLASS study.

The August 5, 2001, article, which took months of investigation supported by the resources of the *Washington Post*, revealed that defendants had deliberately concealed the full-study data from *JAMA*'s peer reviewers and editors. *JAMA*'s editor-in-chief told the *Washington Post*: "'I am disheartened to hear that they had those data at the time that they submitted [the manuscript] to us . . . . We are functioning on a level of trust that was, perhaps, broken.'" JA:0203. "'We were flabbergasted,'" declared M. Michael Wolfe, a Boston University gastroenterologist and *JAMA* peer-reviewer who had written a favorable editorial to accompany the misleading study results. JA:0203. "'I am furious,'" he told the *Washington Post*, "'I looked like a fool . . . . But . . . all I had available to me was the data presented in the article.'" JA:0203.

The *Washington Post* further revealed that discovery of Petitioners' deliberate deception had induced *JAMA*'s editors to change the journal's editorial policy and to henceforth require from all authors a *sworn statement* taking "'responsibility for the integrity of the data and the accuracy of the data analyses.'" JA:0203. And *JAMA*'s chief editors have

more recently lamented that the public's confidence in medical research remains "in great jeopardy" due to the "manipulation of studies and publications by the pharmaceutical and medical device industries"—naming Petitioners' CLASS article, that it had published, as a primary example. DeAngelis and Fontanarosa, "Impugning the Integrity of Medical Science: The Adverse Effects of Industry Influence," 299 *JAMA* 1833-35 (Apr. 16, 2008).

Respondents, who had purchased Pharmacia stock at prices affected by the fraud, filed their original complaint for violations of §§10(b) and 20(a) of the Securities Exchange Act of 1934, on April 7, 2003, roughly 18 months after the *Washington Post* exposed wrongdoing, and well within the periods prescribed by 28 U.S.C. §1658(b), which requires filing "not later than the earlier of—(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation."

B. Proceedings Below

After the district court consolidated several related actions, Petitioners moved to dismiss the consolidated case, insisting that the facts recited in the complaint could raise no inference of fraudulent intent, because "interpretations of scientific data . . . are inherently subject to varying interpretations." Motion to Dismiss Consolidated Amended Class Action Complaint, Docket No. 41, at 37. Thus, Petitioners argued, "a disagreement over the proper interpretation of scientific study results cannot, as a matter of law, establish scienter." *Id.* at 38.

Respondents opposed this motion, pointing out that the events described in the complaint, which had come to public attention following the August 2001,

Washington Post article's publication, amounted to something other than an honest scientific dispute. Brief in Opposition to Motion to Dismiss, Docket No. 44, at 13. The district court denied Petitioners' motion. Pet. App. 37a.

Thereafter, the district court certified a class of investors who purchased Pharmacia stock between April 17, 2000, and February 6, 2001. Although Respondents had asked for a longer Class Period, the district court found that the information posted to the FDA website on February 6, 2001, constituted a "curative disclosure." JA:0014. Petitioners then moved for summary judgment, arguing that in light of this finding, the suit, which was filed April 7, 2003, was untimely. The district court granted Petitioners' motion. Pet. App. 35a-36a.

Following entry of final judgment, Respondents appealed from the district court's orders truncating the Class Period and entering summary judgment. Petitioners cross-appealed, complaining that their motion to dismiss was improperly denied as Respondents could allege no facts showing the fraudulent intent required for a violation of §10(b).

On appeal, the Third Circuit reversed the summary judgment. Investors are not placed on inquiry notice of §10(b) claims, the court explained, until "'they ha[ve] sufficient information of possible wrongdoing to place them on inquiry notice or to excite storm warnings of culpable activity.'" Pet. App. 10a (quoting *Benak v. Alliance Capital Mgmt. L.P.*, 435 F.3d 396, 400 (3d Cir. 2006)). "For inquiry notice to take hold, there must be some indicia of potential malfeasance." Pet. App. 18a. But on the record in this case, "there was no indication that [Petitioners] deliberately withheld data from *JAMA*, or improperly

massaged the data, until the *Washington Post* article in August 2001." Pet. App. 16a. Because the *Washington Post* article "raised the red flag of impropriety," placing reasonable investors on inquiry notice of potential §10(b) claims less than two years before they filed suit, Respondents' claims were timely. Pet. App. 8a, 18a. The Third Circuit accordingly vacated the district court's entry of summary judgment. Pet. App. 18a.

Having already discussed the record facts of this case at some length, the Third Circuit disposed of Petitioners' contention on cross-appeal that Respondents never pleaded facts raising the strong inference of scienter required to proceed with securities claims under *Tellabs*. *"When examined as a whole,"* the court observed, "the Amended Complaint is replete with allegations that defendants acted with the requisite scienter." Pet. App. 19a (emphasis added). The Third Circuit weighed Petitioners' contention that the case presented nothing more than a "legitimate disagreement over scientific data," and then held that Respondents' allegations of deliberate concealment and calculated prevarication illustrated not a *legitimate* scientific dispute, but a "bad faith misrepresentation of scientific data." Pet. App. 20a. This was "sufficient to withstand . . . 'requirements' . . . that the allegations give rise to a strong inference of scienter." Pet. App. 20a (citation omitted).

REASONS FOR DENYING THE WRIT

Petitioners offer no credible reason why this Court's review is needed. Petitioners portray a "substantial split" of authority as to what an investor must know to be placed on inquiry notice of a potential securities-fraud claim, Pet. 13, but the purported conflicts are illusory. In the context of

§10(b) actions, lower courts uniformly require that facts available to an investor suggest *wrongdoing* in order for the investor to be deemed on inquiry notice of her potential claims. This requirement comports with this Court's decisional authority, and the plain language of §1658(b). *See infra* at 11-29.

Furthermore, the Third Circuit accurately and explicitly followed this Court's precedent in *Tellabs* in reviewing the district court's denial of Petitioners' motion to dismiss. *See infra* at 29-32.

There is no need for this Court's review.

A. The Decision Below Comports with the Plain Language of §1658(b)

Congress has provided that a securities-fraud claim is timely if filed by "the earlier of—(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation." 28 U.S.C. §1658(b).

Prior to §1658(b)(1)'s enactment in 2002, this Court held in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), that §10(b) claims were governed by the limitations provisions of 1934 Act §9(e), requiring actions to be "brought within one year after the discovery of the facts constituting the violation and within three years after such violation." 15 U.S.C. §78i(e). This Court further held that "[t]he 1-year period, by its terms, *begins after discovery of the facts constituting the violation, making tolling unnecessary*." *Lampf*, 501 U.S. at 363 (emphasis added). And even before *Lampf*, circuit-court decisions had long held that, in an action under §10(b), the knowledge which will start the limitations period is "'that of "the *facts* forming the *basis* of [the] cause of action"'" such that "'the aggrieved party has either

knowledge of the violation or notice of facts which, in the exercise of due diligence, would have led to actual knowledge' thereof." [2]

The statutory limitations period, by its terms begins only "after the discovery of the facts constituting the violation," 28 U.S.C. §1658(b)(1), but there is, of course, no *violation* of §10(b) without fraudulent intent or "scienter." Indeed, this Court holds "that scienter is an element of a violation of §10(b) and Rule 10b-5, regardless of the identity of the plaintiff or the nature of the relief sought." *Aaron*, 446 U.S. at 691; *accord Basic*, 485 U.S. at 240 n.18 (quoting *Aaron*, 446 U.S. at 691). Because an innocently (or negligently) false or misleading representation is not a violation of §10(b), *see Aaron*, 446 U.S. at 691, the statute does not begin to run until investors have good reason to believe that the defendant in fact acted with scienter. *Law v. Medco Research*, 113 F.3d 781, 786 (7th Cir. 1997); *see also Young v. Lepone*, 305 F.3d 1, 10 (1st Cir. 2002). The Third Circuit noted below that in contrast to certain other securities claims, §10(b) requires a plaintiff to prove scienter. Pet. App. 13a n.4. "This is a distinction with a difference, both in terms of what a plaintiff must show for recovery *and* in terms of what infor-

---

[2] *Jensen v. Snellings*, 841 F.2d 600, 606 (5th Cir. 1988) (emphasis in original; citations omitted); *see also Durham v. Business Mgmt. Assocs.*, 847 F.2d 1505, 1508 (11th Cir. 1988) (statute of limitations in §10(b) action commences "when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the alleged violations"); *Johns Hopkins Univ. v. Hutton*, 488 F.2d 912, 917 (4th Cir. 1973) ("'discovery' means either actual knowledge or notice of facts which, in the exercise of due diligence, would have led to actual knowledge of the violation") (quoting *Goldenberg v. Bache & Co.*, 270 F.2d 675, 681 (5th Cir. 1959)).

mation must be available for inquiry notice to take hold." Pet. App. 13a n.4 (emphasis in original); *accord Law*, 113 F.3d at 786-87.

B. Petitioners Have Not Identified a Genuine Conflict Among the Circuits with Respect to Inquiry Notice

Petitioners' purported "split of authority" fails to identify meaningful differences. In the Fourth and Eleventh Circuits, they say, the limitations period begins to run as soon as "'storm warnings' of '*possible' fraud*" exist, whereas "[t]he Fifth and Eighth Circuits appear to trigger the limitations period as soon as a plaintiff is on notice of 'storm warnings' of *possible fraud*, provided that a reasonably diligent inquiry could have uncovered the facts supporting a fraud claim within the limitations period." Pet. 13, 14 n.4 (emphasis added). In the First, Sixth, Seventh and Tenth Circuits, Petitioners say, the limitations period commences "when the plaintiff becomes aware, through 'storm warnings' or otherwise, of *the possibility that it has been defrauded* and, having exercised reasonable diligence, should have discovered facts underlying the fraud," with the Second Circuit following this approach too unless the investor fails to make a reasonable inquiry. Pet. 14 (emphasis added).

Petitioners acknowledge that "[t]he Third Circuit purports to follow a similar approach." Pet. 15. So does the Ninth Circuit when it holds that an investor "is on inquiry notice when there exists sufficient *suspicion of fraud* to cause a reasonable investor to investigate the matter further." *Betz v. Trainer Wortham & Co.*, 519 F.3d 863, 876 (9th Cir. 2008), *pet. for cert. filed*, No. 07-1489 (May 27, 2008) (emphasis added).

Petitioners thus appear to concede that all circuits require meaningful indications of *possible fraud* to place investors on inquiry notice of §10(b) claims. And because scienter is an indispensible element of fraud, *see Aaron*, 446 U.S. at 691, all circuits require an indication of scienter in order to trigger inquiry notice.

This Petitioners deny, asserting that in all but the Third and Ninth Circuits, "storm warnings" may consist of *any* information that contradicts defendants' prior representations, whether or not any facts exist to suggest dishonesty. Pet. 15, 24. The precedents, however, demonstrate this is not true; they reflect a uniform requirement that the plaintiff be aware of genuinely *suspicious circumstances*, and that contradictory facts coming to investors' attention must suggest the *possibility of fraud* before the statute of limitations will begin to run.[3] The Third and Ninth

---

[3] *See Young v. Lepone*, 305 F.3d 1, 8 (1st Cir. 2002) ("storm warnings" must "alert" investor that "fraud [is] in the wind"); *LC Capital Partners, L.P. v. Frontier Ins. Group, Inc.*, 318 F.3d 148, 154 (2d Cir. 2003) (information must suggest probability of fraud); *Staehr v. Hartford Fin. Servs. Group*, 547 F.3d 406, 427 (2d Cir. 2008) ("Inquiry notice may be found as a matter of law only when uncontroverted evidence clearly demonstrates when the plaintiff should have discovered the fraudulent conduct."); *Cooke v. Manufactured Homes, Inc.*, 998 F.2d 1256, 1262 (4th Cir. 1993) (information susceptible to "different interpretations" cannot create inquiry notice as a matter of law); *Sudo Props. v. Terrebonne Parish Consol. Gov't*, 503 F.3d 371, 376 (5th Cir. 2007) (information that does not create inference of bad faith does not trigger inquiry notice); *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003) (requiring knowledge of "suspicious facts"); *Fujisawa Pharm. Co. v. Kapoor*, 115 F.3d 1332, 1335 (7th Cir. 1997) (requiring "suspicious circumstances"); *LaSalle v. Medco Research*, 54 F.3d 443, 446 (7th Cir. 1995) (information must

Circuits agree with the national consensus that the limitations period does not begin until plaintiff knows or should know "that a *fraudulent* misrepresentation has been made."[4]

This is not to say that a plaintiff must be aware of "evidence supporting *each element of its claim*," in order for the limitations period to start running. Pet. 16 (citing *Betz*, 519 F.3d at 867-68 (Kozinski, C.J., dissenting)). Petitioners conflate the terms "viola-

---

give rise to an "inference of probable misrepresentation"); *Marks v. CDW Computer Ctrs.*, 122 F.3d 363, 368 (7th Cir. 1997) (inquiry notice arises when plaintiff should discover fraudulent conduct); *Great Rivers Coop. v. Farmland Indus.*, 120 F.3d 893, 897 (8th Cir. 1997) (same); *Sterlin v. Biomune Sys., Inc.*, 154 F.3d 1191, 1203 (10th Cir. 1998) (facts must be "'calculated to excite inquiry'"); *Tello v. Dean Witter Reynolds, Inc.*, 494 F.3d 956, 968 (11th Cir. 2007) ("*Tello II*") (requiring specific factual information suggestive of fraud); *see also Bradley v. Nat'l Ass'n of Sec. Dealers Dispute Resolution*, 433 F.3d 846, 849 (D.C. Cir. 2005) (applying D.C. law to find inquiry notice does not arise until plaintiff has "*some evidence of wrongdoing*") (emphasis added); *cf. Nevada Power Co. v. Monsanto Co.*, 955 F.2d 1304, 1308 (9th Cir. 1992) (finding under Nevada law that where defendants' state of mind is an element of plaintiffs' cause of action, plaintiffs' belief that statements were *innocently* made may toll the statute of limitations).

[4] *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1412 (9th Cir. 1987) (emphasis added); *see also Gray v. First Winthrop Corp.*, 82 F.3d 877, 880-81 (9th Cir. 1996) (same, and finding merely contradictory statements insufficient to create inquiry notice as a matter of law); *Berry v. Valence Tech., Inc.*, 175 F.3d 699, 704 (9th Cir. 1999) (information must raise "sufficient suspicion of *fraud*") (emphasis added); *Betz*, 519 F.3d at 871 (requiring "sufficient suspicion of *fraud*") (emphasis added); *In re NAHC, Inc., Sec. Litig.*, 306 F.3d 1314, 1325 (3d Cir. 2002) (requiring "'sufficient information of possible *wrongdoing*'") (emphasis added; citation omitted); *accord DeBenedictis v. Merrill Lynch & Co.*, 492 F.3d 209, 216 (3d Cir. 2007); *Benak*, 435 F.3d at 397.

tion" and "claim," but the two are different.[5] A *violation* of §10(b) occurs when an individual engages in its proscribed conduct—*i.e.*, "when he or she employs manipulative or deceptive devices in connection with the purchase or sale of securities." *GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189, 206 n.6 (3d Cir. 2001). A private §10(b) claim seeks reparation for the harm caused by the violation.[6] In order to establish a claim, a plaintiff must not only prove all of the elements of a violation of §10(b), but must also prove, *inter alia*, reliance, loss causation, and damages. *Dura Pharms.*, 544 U.S. at 341-42. Under §1658's plain terms, a plaintiff need not always possess evidence demonstrating these additional elements in order to be on notice of "the facts constituting the violation" of §10(b).

The dissent in *Betz* conflated "violation" and "claim," protesting that plaintiff "couldn't be on inquiry notice until she had solid proof of every single element of her 10b-5 *claim*." *Betz*, 519 F.3d at 867 (Kozinski, C.J., dissenting) (emphasis added). But the panel in *Betz* simply adopted the rule that

---

[5] *See SEC v. Rana Research*, 8 F.3d 1358, 1364 (9th Cir. 1993) ("reliance is not an element of a Rule 10b-5 violation by misrepresentation; rather, it is an element of a private cause of action for damages implied thereunder"); *Schellenbach v. SEC*, 989 F.2d 907, 913 (7th Cir. 1993) (an action by the SEC for §10(b) violation "need not include proof of harm"); *SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985) (a violation of §10(b) does not require proof "that any investor actually relied on the misrepresentations or that the misrepresentations caused any investor to lose money").

[6] *See SEC v. Tambone*, 550 F.3d 106, 130 (11th Cir. 2008) (unlike private plaintiff seeking to establish a claim for relief, SEC not required to show reliance, economic loss, or loss causation to establish §10(b) violation).

prevails nationwide: "A plaintiff is on inquiry notice when there exists sufficient suspicion of fraud to cause a reasonable investor to investigate the matter further." *Id.* at 876 (citing *Fujisawa Pharm. Co. v. Kapoor*, 115 F.3d 1332, 1335 (7th Cir. 1997); *Tello v. Dean Witter Reynolds, Inc.*, 410 F.3d 1275, 1284 (11th Cir. 2005) ("*Tello I*")). Thus, neither the Third Circuit, nor the Ninth, nor any other federal appellate court has ever held that the limitations period on §10(b) claims does not run until plaintiff has evidence of the additional *elements*, such as reliance or loss causation, that may be necessary to state a *private claim* for relief.

The statute and the decisional law say the statute begins to run upon "discovery of the facts constituting the *violation*"—which necessarily includes facts showing scienter. 28 U.S.C. §1658(b)(1) (emphasis added); *Aaron*, 446 U.S. at 691.

C. The Lower Courts Uniformly Require that Facts Available to an Investor Suggest Wrongdoing to Create Inquiry Notice of §10(b) Claims

Undaunted by the lack of genuine conflict among the lower courts, Petitioners accuse the Third Circuit of "depart[ing] from the overwhelming weight of authority" and, together with the Ninth Circuit, creating an inquiry notice standard that is the "functional equivalent" of actual notice because it requires some indication *of fraud*. Pet. 17.

Citing the Sixth Circuit's unremarkable holding in *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 502 (6th Cir. 2003), that "'*direct* evidence of scienter is not necessary to a determination of fraud,'" Petitioners conclude that "to constitute 'storm warnings,' information need

not indicate that the defendant acted with scienter." Pet. 16 (emphasis added). This hardly follows. Though "the proof of scienter required in fraud cases is often a matter of inference from circumstantial evidence," *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983), still it is fraud that must be shown. *Id.* at 389-90; *see Aaron*, 446 U.S. at 691; *Ernst & Ernst*, 425 U.S. at 193. In fact, the Sixth Circuit held in *New England Health Care* that the statute ran *because* the facts showed scienter: "In this case, we believe, the facts . . . *strongly suggest* that Fruit's auditors were *at least reckless*. . . . In the light of the particular allegations against Fruit, we are at a loss to understand why [plaintiff] should not have determined, by July 1, 1998, *that Ernst knowingly or recklessly* participated in the alleged fraud." 336 F.3d at 502 (emphasis added).

Petitioners cite the Eleventh Circuit's opinion in *Theoharous v. Fong*, 256 F.3d 1219, 1228 (11th Cir. 2001), as "rejecting plaintiffs [sic] argument that she was not on inquiry notice 'because she could not reasonably have known . . . that the defendants had acted with . . . scienter.'" Pet. 16. And the Solicitor General, representing the United States as *amicus curiae* in *Betz*, takes *Theoharous* as suggesting that in the Eleventh Circuit, "suspicion of scienter is not required to constitute 'inquiry notice.'" *See* Brief for the United States as *Amicus Curiae* at 17 in *Trainer Wortham & Co. v. Betz*, No. 07-1489 (U.S. Apr. 22, 2009). Yet the Eleventh Circuit rejected plaintiffs' argument not because knowledge of facts showing scienter was unnecessary, but because under the facts of that case, an inference of scienter was clear where, after repeated public statements of financial health, the defendant abruptly filed for bankruptcy. *Theoharous*, 256 F.3d at 1223. The unanticipated

bankruptcy filing demonstrated that "previous reports of solid financial health were inaccurate," and placed investors on notice "of the possibility *that [defendant] had violated Section 10(b).*" *Id.* at 1228 (emphasis added).

In *Tello I*, the Eleventh Circuit more recently declared: "Inquiry notice in our circuit as to securities fraud occurs when a potential plaintiff discovers facts evidencing securities *fraud.*" *Tello I*, 410 F.3d 1275, 1289 (11th Cir. 2005) (emphasis added). The court refused to find as a matter of law that certain media items had placed plaintiffs on inquiry notice of the fraud alleged in the complaint, remanding the case to the district court for a factual determination of whether

> *sufficient information was provided by these sources to cause the class members to realize that [defendant] had committed securities violations* that negatively affected their investments [and] to enable them to file a lawsuit, bearing in mind that many, if not most, of the class members are likely lay persons unknowing about the intricacies of the securities laws as to what constitutes a securities violation as opposed to simply losing money because of a market decline.

Id. at 1291 (emphasis added); *see also La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 847 (11th Cir. 2004) (reversing statute-of-limitations dismissal where the facts available to plaintiffs could be explained by "reasons other than fraud" and were thus insufficient to create inquiry notice of fraud).

Citing *Sterlin v. Biomune Systems, Inc.*, 154 F.3d 1191, 1196, 1203 (10th Cir. 1998), the Solicitor General as *amicus curiae* in *Betz* suggests that know-

ledge of facts showing scienter is not a prerequisite to inquiry notice in the Tenth Circuit. Brief for the United States as *Amicus Curiae* at 17 in *Trainer Wortham & Co. v. Betz*, No. 07-1489 (U.S. Apr. 22, 2009). But that is simply wrong. In fact, *Sterlin* holds that "inquiry notice . . . triggers an investor's duty to exercise reasonable diligence and . . . the . . . limitations period begins to run once the investor, in the exercise of reasonable diligence, *should have discovered the facts underlying the alleged fraud.*" 154 F.3d at 1201 (emphasis added). While inquiry notice could be triggered by something less than "indisputable proof," the Tenth Circuit found, the facts nevertheless had to "alert a reasonable investor to the possibility of *fraud*." *Id.* at 1203-04 (emphasis added). On the facts before it, the Tenth Circuit found that a *Barron's* article which disparaged the defendant company's founder, stating there was a "'one in 100 chance'" that the company was engaged in a legitimate business venture, and suggesting the company's true purpose was only "'to sell shares,'" contained sufficient information to place investors on inquiry notice of fraud. *Id.* at 1202-03. Although the article did not "discuss each and every aspect of the alleged *fraudulent* activity," the court stated, "a reasonable investor would have investigated further after reading" it. *Id.* at 1204. More than merely contradicting defendants' statements, the *Barron's* article assailed their integrity. Indeed, it would be hard to describe the article as suggesting anything other than fraud. *Cf. Berry*, 175 F.3d at 705 & n.8 (contrasting *Barron's* article in *Sterlin* with one that did not "challenge[] . . . [defendant's] honesty or good faith").

The *Sterlin* decision is one that other circuits have favorably cited—and followed.[7] Tellingly, Petitioners themselves lump the Tenth Circuit's *Sterlin* opinion with the law of "the First, Sixth, Seventh and Tenth Circuits," where "the limitations period appears to commence on the date when the plaintiff becomes aware, through 'storm warnings' or otherwise, of the possibility that *it has been defrauded* and, having exercised reasonable diligence, should have discovered *the facts underlying the fraud*." Pet. 14 (citing *Sterlin*, 154 F.3d at 1201) (emphasis added).

Petitioners say the Seventh Circuit in *Fujisawa Pharmaceutical Co. v. Kapoor*, 115 F.3d 1332 (7th Cir. 1997), "rejected the plaintiff's argument that it was not put on inquiry notice by the revelation of misrepresentations that arguably were not the product of fraud." Pet. 23. In fact, the Seventh Circuit held that the plaintiffs "should have begun *suspecting fraud* many years earlier" than they did, and cautioned:

> Inquiry notice . . . must not be construed so broadly that the statute of limitations starts running too soon for the victim of the fraud to be able to bring suit within a year. The facts constituting such notice must be *sufficiently probative*

---

[7] *See, e.g., Young v. Lepone*, 305 F.3d 1, 10 (1st Cir. 2002); *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 168 (2d Cir. 2005); *Rothman v. Gregor*, 220 F.3d 81, 97 (2d Cir. 2000); *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1325 (3d Cir.2002); *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 500 (6th Cir. 2003); *Betz v. Trainer Wortham & Co.*, 519 F.3d 863, 870 (9th Cir. 2008); *Berry v. Valence Technology, Inc.*, 175 F.3d 699, 704 (9th Cir. 1999); *Realmonte v. Reeves*, 169 F.3d 1280, 1284 n.5 (10th Cir. 1999); *Tello I*, 410 F.3d 1275, 1285 (11th Cir. 2005).

> *of fraud—sufficiently advanced beyond the stage of a mere suspicion*, sufficiently confirmed or substantiated—not only to incite the victim to investigate but also to enable him to tie up any loose ends and complete the investigation in time to file a timely suit.

Fujisawa, 115 F.3d at 1335 (emphasis added). The court added that inquiry notice has a "generous" meaning, and requires that plaintiff be "in possession of, or with ready access to, the *essential facts* that he needs in order to be able to sue." *Id.* at 1337 (emphasis added). The "essential fact" that was missing here, the Third Circuit found, was any indication of Respondents' scienter. Pet. App. 13a-14a. *Fujisawa* supports this finding.

The Seventh Circuit refined its inquiry-notice analysis in *Law*, finding that an investor who knows defendant has made an "untrue statement" is not placed on inquiry notice of potential §10(b) claims unless the facts available to the investor suggest the statement was *knowingly* false. *Law*, 113 F.3d at 785-86. Other circuits have echoed the Seventh Circuit's reasoning—often with explicit reference to *Fujisawa* and *Law*.[8]

---

[8] *See Mathews v. Kidder, Peabody & Co.*, 260 F.3d 239, 253 (3d Cir. 2001) (citing *Fujisawa*, 115 F.3d at 1335); *Benak v. Alliance Capital Mgmt. L.P.*, 435 F.3d 396, 401 (3d Cir. 2006) (same); *In re Merck & Co., Inc. Sec. Derivative & ERISA Litig.*, 543 F.3d 150, 164 (3d Cir. 2008) (same); *Ritchey v. Horner*, 244 F.3d 635, 640-41 (8th Cir. 2001) (same); *Tello I*, 410 F.3d 1275, 1284 (11th Cir. 2005) (same); *Sudo Props. v. Terrebonne Parish Consol. Gov't*, 503 F.3d 371, 377 (5th Cir. 2007) (investor not on notice of §10(b) claims where he had no information to suggest he had been *deliberately* misled); *Berry v. Valence Technology, Inc.*, 175 F.3d 699, 705 (9th Cir. 1999) (article that did not

The decisions holding that an investor is not placed on inquiry notice of §10(b) claims unless she is aware of facts suggesting "malfeasance," "intentional impropriety," or "fraud" do not, as Petitioners worry, "eliminate[] the concept" of inquiry notice. Pet. 17 (citing *Betz*, 519 F.3d at 878; *Merck*, 543 F.3d at 166). A careful reading of the decisional law belies the existence of the "split of authority" portrayed by Petitioners.

Finally, despite their insistence that "Respondents' claims . . . are viable today only because the Third Circuit departed" from its sister circuits, Pet. 17, Petitioners do not show that any other circuit court would have decided this case differently. That cases cited by Petitioners have had varying outcomes does not illustrate a split of authority with regard to inquiry notice. Rather, it demonstrates, as courts have long recognized, that the issue of when a plaintiff is on notice of her claims—an affirmative defense on which the defendant bears the burden of proof—is intensely fact-driven, and as such not normally suited to summary disposition.[9] The determination is

---

challenge "the *honesty or good faith*" of defendant's directors was insufficient to place investor on inquiry notice) (emphasis added); *Newman v. Warnaco Group, Inc.*, 335 F.3d 187, 194 (2d Cir. 2003) (amended financial statements did not place investors on inquiry notice of §10(b) claims, because they "did not contain *any* indication that fraud was being perpetrated") (emphasis in original).

[9] *See Young*, 305 F.3d at 9 ("The multifaceted question of whether storm warnings were apparent involves issues of fact."); *Lentell*, 396 F.3d at 169 (recognizing "the fact-specific nature of the limitations defense, particularly where the claim is foreclosed by inquiry notice"); *Davis v. Grusemeyer*, 996 F.2d 617, 623 n.10 (3d Cir. 1993) ("the applicability of the statute of limitations usually implicates factual questions as to when

one that, like materiality, "requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact." *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 450 (1976).

D. The Decision Below Does Not Thwart the Purpose of Inquiry Notice

Petitioners say that the Third Circuit's "departure" from established precedent creates a "standard [that] encourages a plaintiff to sit on its hands notwithstanding evidence of possible fraud and wait for information sufficient to plead a claim to appear fortuitously." Pet. 17-18.

Yet all courts recognize that statutes of limitation must

> strike[] a balance between two competing policies underlying the securities laws. While we recognize there is a strong federal interest in requir-

---

plaintiff discovered or should have discovered the elements of the cause of action"); *Great Rivers*, 120 F.3d at 897 ("the determination of awareness [of storm warnings] is by its terms a factual analysis"); *Ritchey*, 244 F.3d at 640 (issue of whether plaintiffs were on inquiry notice of their claims was "far too factual to be resolved at the summary judgment stage"); *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 879 (9th Cir. 1984) ("The question of what a reasonably prudent investor should have known is particularly suited to a jury determination."); *Olcott v. Delaware Flood Co.*, 76 F.3d 1538, 1549 (10th Cir. 1996) (remanding to the district court to make a "factual finding" of when plaintiff was on notice of his claims, which was a "necessary prerequisite for determining" whether the claim was timely); *Tello I*, 410 F.3d at 1293 (noting that resolution of statute-of-limitations issue in securities-fraud case requires "factual development").

> ing plaintiffs to file suit soon after they are put on notice of their claims, the applicable statute of limitations should not precipitate groundless or premature suits by requiring plaintiffs to file suit before they can discover with the exercise of reasonable diligence the necessary facts to support their claims.

Sterlin, 154 F.3d at 1202. Indeed, the Eleventh Circuit has observed that "unsubstantiated knowledge is an insufficient basis for filing actions for violations of the securities laws, and, waiting until such facts are developed and available, promotes judicial efficiency and justice." *Tello I*, 410 F.3d at 1287. And the Seventh Circuit cautions against Petitioners' approach to inquiry notice as encouraging "premature and potentially groundless" claims, filed before plaintiff has "obtained 'good evidence of fraud.'"[10]

This concept is universal. For example, the Third Circuit has long embraced these principles, *see Mathews*, 260 F.3d at 251-52, and *Benak*, 435 F.3d at 401, and reiterated them in *Merck*: "In this vein, we have emphasized that '[u]ndergirding the inquiry notice analysis is the assumption that a plaintiff either was or should have been able, in the exercise of

---

[10] *Marks*, 122 F.3d at 370 (quoting *Law*, 113 F.3d at 786). *See also Mathews*, 260 F.3d at 253 (discouraging a broad interpretation of inquiry notice which would cause "a flood of untimely litigation"); *Young*, 305 F.3d at 9 (noting competing interests of "the staunch federal interest in requiring plaintiffs to bring suit promptly" and "the equally strong interest in not driving plaintiffs to bring suit prematurely, that is, before they are able . . . to discover the facts necessary to support their claims"); *New England Health Care*, 336 F.3d at 501 (acknowledging the need for "an appropriate balance" between these interests) (citing *Young*, 305 F.3d at 9).

reasonable diligence, to file an adequately pled securities fraud complaint as of an earlier date.'" 543 F.3d at 164 (quoting *Benak*, 435 F.3d at 401). In fact, as the Third Circuit observed below, such a requirement is "suggested" by the Private Securities Litigation Reform Act ("PSLRA"). Pet. App. 18a. The court explained: "A rule that would place investors on inquiry notice of fraud the moment that the FDA questions the seemingly good faith scientific analysis of a pharmaceutical company would encourage putative plaintiffs to file premature securities suits. In imposing heightened pleading requirements, Congress evinced an intent to discourage such suits . . . ." *Id.; accord Levitt v. Bear Stearns & Co.*, 340 F.3d 94, 104 (2d Cir. 2003); *Lentell*, 396 F.3d at 171; *see also Law*, 113 F.3d at 785 (noting that the unavailability of equitable tolling, coupled with the strict pleading requirements of the PSLRA, made it "extremely important" to determine what information the investor must possess to trigger inquiry notice).

Petitioners identify no conflict among the precedents, since all comport with Congress' intention that the limitations period should commence only upon "the discovery of the facts constituting the violation." 28 U.S.C. §1658(b)(1).

E. Petitioners Misconstrue *Basic v. Levinson*

Petitioners also say that "the Third Circuit's holding is inconsistent with the 'efficient market' theory adopted by this Court in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988)." Pet. 25. Petitioners say *Basic* "established a 'fraud on the market' presumption of reliance in Section 10(b) actions based on the hypothesis that all information about a security, which is traded in an efficient market, is incorporated into the price of that security." Pet. 25. Thus,

Petitioners conclude, a reasonable investor must know everything that is publicly available and incorporated into a stock's price. In other words, because a reasonable investor knew that Pharmacia stock closed at $49.82 on February 8, 2001, *ipso facto* she is also deemed to know everything about that company that in any way affected its market price. JA:1287. This is not the holding of *Basic*.

First, *Basic* never adopted the strict-efficiency principle that Petitioners hypothesize. *Basic* holds that investors are entitled to rely upon the "integrity" of market prices, to be free of the effects of manipulation by fraud, *Basic*, 485 U.S. at 247, whether or not the market is truly "efficient" in any strict sense:

> We need not determine by adjudication what economists and social scientists have debated through the use of sophisticated statistical analysis and the application of economic theory. For purposes of accepting the presumption of reliance in this case, we need only believe that market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices.

Id. at 246 n.24. "By accepting this rebuttable presumption," this Court explained, "we do not intend conclusively to adopt any particular theory of how quickly and completely publically available information is reflected in market price." *Id.* at 248 n.28. The understanding that securities prices may be manipulated by fraud, and that those who rely on its integrity may suffer, predates the concept of market efficiency. *See* Adolf A. Berle, Jr., *Liability for Stock Market Manipulation*, 31 Colum. L. Rev. 264, 268-70 (1931); Adolf A. Berle, Jr., *Stock Market Manipulation*, 38 Colum. L. Rev. 393, 394-95 (1938);

Rex v. De Berenger, 3 M. & S. 67, 105 Eng. Rep. 536 (1814); *United States v. Brown*, 5 F. Supp. 81, 85-89 (S.D.N.Y. 1933), *aff'd*, 79 F.2d 321 (2d Cir. 1935).

Second, rather than imputing to a reasonable investor knowledge of all facts affecting a stock's price, *Basic's* fundamental premise is that reasonable investors may *be unaware* of the specific disclosures that in fact affect the market price on which they rely. This Court stated in *Basic*:

> Recent empirical studies have tended to confirm Congress' premise that the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations. It has been noted that "it is hard to imagine that there ever is a buyer or seller who does not rely on market integrity. Who would knowingly roll the dice in a crooked crap game?" Indeed, nearly every court that has considered the proposition has concluded that where materially misleading statements have been disseminated into an impersonal, well-developed market for securities, the reliance of individual plaintiffs *on the integrity of the market price may be presumed*. Commentators generally have applauded the adoption of one variation or another of the fraud-on-the-market theory. An investor who buys or sells stock at the price set by the market does so in reliance *on the integrity of that price*. Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action.

485 U.S. at 246-47 (footnotes and citation omitted; emphasis added).

The genius of free markets is that prices reflect more information than a human mind can hope to comprehend. *See* F.A. Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519, 525-26 (1945). *Basic* does not presume that reasonable investors actually know all information in the public domain, or even that they *should* know it all. Rather, *Basic* adopts the approach the Ninth Circuit articulated in *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975):

> A purchaser on the stock exchange may be either unaware of a specific false representation, or may not directly rely on it; he may purchase because of a favorable price trend, price earnings ratio, or some other factor. Nevertheless, he relies generally on the supposition that the market price is validly set and that no unsuspected manipulation has artificially inflated the price, and thus indirectly on the truth of the representations underlying the stock price—whether he is aware of it or not, the price he pays reflects material misrepresentations.

Id. at 907. Thus, as this Court held in *Basic*, the "'causal nexus'" embodied in the element of reliance "'can be adequately established indirectly, by proof of materiality coupled with the common sense that a stock purchaser does not ordinarily seek to purchase a loss in the form of artificially inflated stock.'" *Basic*, 485 U.S. at 245 (quoting *Blackie*, 524 F.2d at 908).

Far from imputing knowledge to investors, as Petitioners would do, this approach allows investors to rely on the market's integrity without knowing all the information that market price incorporates.

F. The Third Circuit Applied *Tellabs* to Petitioners' Motion to Dismiss

Petitioners say that certiorari is warranted because the Third Circuit "completely overlook[ed]" this Court's ruling in *Tellabs*, 551 U.S. 308. Pet. 29. They also say that "Respondents' scienter allegations consist of only two paragraphs" which fail to adequately allege scienter. Pet. 31. Neither assertion is accurate.

In *Tellabs*, this Court directed courts ruling on a motion to dismiss for failure to meet the stringent pleading requirements of 15 U.S.C. §78u-4(b)(2), to review the complaint *in its entirety*, and to determine whether the facts pleaded therein give rise to a "strong" inference of scienter as compared to non-culpable inferences. 551 U.S. at 321-24. A complaint will survive this scrutiny where "a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Id.* at 324. *Tellabs* directs courts to "assess all the allegations holistically," rather than nitpicking the complaint paragraph by paragraph. *Id.* at 326.

Contrary to Petitioners' assertion that the Third Circuit "completely disregarded *Tellabs*," Pet. at 29, the panel in fact followed *Tellabs* explicitly. After a lengthy inquiry-notice analysis, the court went on to find:

> The District Court correctly denied defendants' motion to dismiss. In that motion, defendants asserted that the plaintiffs failed to meet the pleading requirements of the PSLRA, focusing on the admittedly thin two paragraphs of the Amended Complaint labeled "Scienter Allegations." *When examined as a whole, however, the*

> *Amended Complaint is replete with allegations that defendants acted with the requisite scienter. See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 2499, 2509 (2007) (requiring courts to "consider the complaint in its entirety").

Pet. App. 19a (emphasis added). The court continued: "In particular, the Amended Complaint documents the alleged scheme to trick *JAMA*, and thus the investment community, by using only the truncated data." Pet. App. 19a.

Petitioners say that this Court's review is warranted because the Third Circuit failed to engage in a "comparative analysis" of the competing inferences raised by the facts in the complaint, including the possibility that the facts presented a legitimate scientific disagreement. Pet. 32-34. But the Third Circuit's opinion emphasizes this very balancing:

> While it is true that a legitimate disagreement over scientific data does not give rise to a securities fraud claim, plaintiffs alleged something quite different: a bad faith misrepresentation of scientific data. Those allegations are sufficient to withstand the "[e]xacting pleading requirements" of the PSLRA, which require that the allegations give rise to a strong inference of scienter. *See, e.g., Tellabs, Inc.*, 127 S. Ct. at 2504-10.

Pet. App. 20a.

The Third Circuit was faithful to *Tellabs*.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied. Petitioners have failed to demonstrate that the decision below conflicts with statutory text, authority from this Court, or precedent from the other federal appellate courts.

Respectfully submitted,

PETER S. PEARLMAN
COHN LIFLAND PEARLMAN
HERRMANN & KNOPF LLP
Park 80 Plaza West-One
Saddle Brook, NJ 07663
(201) 845-9600

JOSEPH F. RICE
ANN K. RITTER
GREGG S. LEVIN
JOSH LITTLEJOHN
MOTLEY RICE LLC
28 Bridgeside Blvd.
Mt. Pleasant, SC 29464
(843) 216-9000

ERIC ALAN ISAACSON
Counsel of Record
ARTHUR C. LEAHY
MATTHEW P. MONTGOMERY
COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
655 West Broadway
Suite 1900
San Diego, CA 92101
(619) 231-1058

Counsel for Respondents

June 25, 2009

Supreme Court, U.S.
FILED
AUG 4 - 2009
OFFICE OF THE CLERK

No. 08-1315

IN THE

Supreme Court of the United States

PHARMACIA CORPORATION, PFIZER, INC., FRED HASSAN, DR. G. STEVEN GEIS AND CARRIE COX,
Petitioners,

v.

ALASKA ELECTRICAL PENSION FUND, CITY OF SARASOTA FIREFIGHTERS' PENSION FUND, INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 132 PENSION PLAN, NEW ENGLAND HEALTH CARE EMPLOYEES PENSION FUND, PACE INDUSTRY UNION-MANAGEMENT PENSION FUND AND CHEMICAL VALLEY PENSION FUND OF WEST VIRGINIA, AS CLASS REPRESENTATIVES, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

WILLIAM A. DREIER
STEVEN A. KARG
NORRIS, MCLAUGHLIN & MARCUS, P.A.
P.O. Box 1018
721 Route 202-206
Somerville, New Jersey 08876
(908) 722-0700

DENNIS J. BLOCK
Counsel of Record
JONATHAN M. HOFF
JOSHUA R. WEISS
CADWALADER, WICKERSHAM & TAFT LLP
One World Financial Center
New York, New York 10281
(212) 504-6000

Counsel for Petitioners

August 4, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
I. A GENUINE CONFLICT EXISTS AMONG THE CIRCUITS REGARDING "INQUIRY NOTICE"	3
II. THIS ACTION PRESENTS A COMPELLING OPPORTUNITY TO ADDRESS THE CIRCUIT SPLIT CONCERNING "INQUIRY NOTICE"	6
III. THE THIRD CIRCUIT'S OPINION DISREGARDED THE *TELLABS* MANDATE	11
IV. IF A WRIT OF *CERTIORARI* IS GRANTED IN THIS CASE, THE COURT SHOULD CONSOLIDATE IT WITH *MERCK* FOR ARGUMENT	12
CONCLUSION	13

TABLE OF AUTHORITIES

CASES Page

Basic Inc. v. Levinson, 485 U.S. 224 (1988) 10
Betz v. Trainer Wortham & Co., 519 F.3d 863 (9th Cir.), *pet. for cert. filed*, 76 U.S.L.W. 3646 (U.S. May 27, 2008) (No. 07-1489) 5
In re Merck & Co. Sec., Deriv. & "ERISA" Litig., 543 F.3d 150 (3d Cir. 2008), *cert. granted*, 129 S. Ct. 2432 (2009) 5, 6, 11
Law v. Medco Research, Inc., 113 F.3d 781 (7th Cir. 1997) 8-9
Merck & Co. v. Reynolds, 129 S. Ct. 2432 (2009) 2
Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308 (2007) 3, 11
Trainer, Wortham & Co. v. Betz, 76 U.S.L.W. 3646 (U.S. May 27, 2008) (No. 07-1489) 4

OTHER AUTHORITIES

Brief of the United States, as *Amicus Curiae*, *Trainer Wortham & Co. v. Betz*, No. 07-1489 (Apr. 2009) 4, 8-9

IN THE

Supreme Court of the United States

No. 08-1315

PHARMACIA CORPORATION, PFIZER, INC., FRED HASSAN, DR. G. STEVEN GEIS AND CARRIE COX,
Petitioners,

v.

ALASKA ELECTRICAL PENSION FUND, CITY OF SARASOTA FIREFIGHTERS' PENSION FUND, INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 132 PENSION PLAN, NEW ENGLAND HEALTH CARE EMPLOYEES PENSION FUND, PACE INDUSTRY UNION-MANAGEMENT PENSION FUND AND CHEMICAL VALLEY PENSION FUND OF WEST VIRGINIA, AS CLASS REPRESENTATIVES, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

In their petition for a writ of *certiorari* (the "Petition"), Petitioners established that a writ of *certiorari* should be issued in this action. First,

Petitioners established that a significant split of authority exists over the standard for determining whether and when a plaintiff is on "inquiry notice" of a claim under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") for purposes of determining the commencement of the statute of limitations. Petitioners also established that the Third Circuit's decision below further exacerbated the split among the circuits.

Respondents' principal argument in opposition is that no disagreement exists among the circuits. Respondents further argue that "Petitioners do not show that any other circuit court would have decided this case differently." Respondents' arguments are without merit.

This Court recognized the existence of the significant split of authority when, on May 26, 2009, it granted a writ of *certiorari* from the Third Circuit's decision in *Merck & Co. v. Reynolds*, 129 S. Ct. 2432 (2009) ("*Merck*"), a case which presented substantially similar questions to those presented here. Indeed, here the Third Circuit reversed the District Court and purported to base its decision on its decision in *Merck*. Surprisingly, Respondents do not mention the grant of the *Merck* petition. There also can be no question that Respondents' claims would have been dismissed as time-barred under "inquiry notice" standards adopted by other circuits. For that matter, Respondents' claims would have been dismissed as time-barred had the Third Circuit applied the reasoning underlying the "inquiry notice" standard that it applied in *Merck*.

Thus, Petitioners' Petition is equally as compelling as Merck's and the Court may be required to address issues concerning the "inquiry notice" standard that

are not present in *Merck*. Given the substantial similarity between the issues addressed in this Petition and the *Merck* petition, Petitioners' request that, if this Petition is granted, the Court consolidate the arguments in the two actions pursuant to Supreme Court Rule 27.3.

Second, Petitioners established that a writ of *certiorari* should be issued because the Third Circuit's Opinion conflicts with the precedent established by this Court in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007), concerning the standards by which a court determines the adequacy of a plaintiff's scienter allegations for purposes of Section 10(b). Respondents contend that the Third Circuit complied with *Tellabs* simply because it found that the complaint was "replete with allegations of scienter." Respondents are wrong. The Third Circuit indisputably failed, as did the District Court below, to undertake any scienter analysis, let alone the comparative analysis required by *Tellabs* to determine whether "a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged."

I. A GENUINE CONFLICT EXISTS AMONG THE CIRCUITS REGARDING "INQUIRY NOTICE"

The issuance of a writ of *certiorari* is appropriate where, as here, there is a significant split of authority among the Courts of Appeals. Petitioners established that, while the circuits all agree that "inquiry notice" can trigger the commencement of the limitations period for a Section 10(b) claim, there is significant disagreement over when "inquiry notice" exists and how "inquiry notice" is determined. Pet. 3-4. Peti-

tioners further established that, in *Merck*, the Third Circuit adopted an "inquiry notice" standard that deviated from the standards adopted by the other circuits (except the Ninth Circuit), and, in purporting to apply that approach to this case, further exacerbated the circuit split.

In response, Respondents erroneously contend that there is no split of authority regarding the "inquiry notice" standard. On May 26, 2009, this Court granted a writ of *certiorari* in *Merck* – the very case on which the Third Circuit purported to base its opinion in this case. Because the issues in *Merck* are substantially similar to the issues raised in this case, the issuance of a writ of *certiorari* in *Merck* resolves any debate concerning the existence of a significant circuit split regarding the "inquiry notice" standard. Respondents do not attempt to distinguish the principal questions presented here from those presented in *Merck*, nor do they explain why the issuance of a writ in this case is inappropriate in light of the issuance of the writ in *Merck*.[1]

Respondents also contend that their claims are not time-barred under any of the "inquiry notice" standards identified by Petitioners. Respondents are

---

[1] We note that in *Trainer Wortham & Co. v. Betz*, 76 U.S.L.W. 3646 (U.S. May 27, 2008) (No. 07-1489) ("*Betz*"), the Solicitor General filed an *amicus curiae* brief in which she reviewed the standards in various circuits and concluded that there is a significant circuit split. Brief for the United States, as *Amicus Curiae*, *Trainer Wortham & Co. v. Betz*, No. 07-1489 (Apr. 2009) ("Amicus Br."), 13-18. Respondents also appear to take issue with the Solicitor General's conclusion. Resp. Br. 18-20. The Solicitor General's brief, which was filed one day before the Petition, noted that *Merck*, unlike *Betz*, may be an appropriate case for this Court to address the circuit split. Amicus Br. 18 n.6.

wrong. In the Third and Ninth Circuits, "inquiry notice" requires "storm warnings" of "culpable activity" consisting of evidence that defendants acted with scienter – that is, "some reason to suspect that defendants did not genuinely believe the accuracy of their statements" or that defendants engaged in "malfeasance" or "intentional impropriety." Pet. App. 17a; *see Betz v. Trainer Wortham & Co.*, 519 F.3d 863, 878 (9th Cir. 2008), *pet. for cert. filed*, 76 U.S.L.W. 3646 (U.S. May 27, 2008) (No. 07-1489); *In re Merck & Co. Sec., Deriv. & "ERISA" Litig.*, 543 F.3d 150, 166 (3d Cir. 2008), *cert. granted*, 129 S. Ct. 2432 (2009). In all the other circuits, however, "inquiry notice" is triggered upon the existence of "storm warnings," which those courts define as information that indicates only the "possibility" of fraud that need not consist of evidence concerning each element of a plaintiff's claim. Rather, "storm warnings" exist when the plaintiff becomes aware of facts contradicting the defendant's prior statements. Pet. 3-4, 13-16. None of these circuits require evidence of the defendant's scienter to constitute "storm warnings." As Petitioners established, it is indisputable that the February 2001 FDA Disclosures (as defined in the Petition) – which were widely disseminated to the market by way of the FDA website and extensive analyst and media coverage – constituted "storm warnings" under the standard adopted by the circuits other than the Third and Ninth. Pet. 8-10, 18-20. Accordingly, under the standard adopted by a majority of the circuits, Respondents would have been on notice of "storm warnings" as of February 2001 – more than two years before they filed their complaint.

II. THIS ACTION PRESENTS A COMPELLING OPPORTUNITY TO ADDRESS THE CIRCUIT SPLIT CONCERNING "INQUIRY NOTICE"

The Petition and the *Merck* petition present two questions to the Court. First, the Court is being asked to determine whether "inquiry notice" requires the existence of "storm warnings" consisting of facts suggesting that defendant acted with scienter and, if so, what are the circumstances under which such facts exist. Second, the Court is being asked to determine when, in relation to the existence of "storm warnings," the limitations period commences. Both petitions present substantially similar issues and take substantially similar positions. Moreover, the facts and circumstances of this case make it a compelling vehicle to address these issues because the Court may be required to address issues not present in *Merck*.

In *Merck*, plaintiffs alleged that Merck violated the Exchange Act by intentionally mischaracterizing the findings of a study comparing the cardiovascular safety profile of Merck's drug, Vioxx, to a comparator drug, naproxen. The Third Circuit rejected Merck's contention that a warning letter from the FDA reprimanding Merck for misrepresenting the cardiovascular safety profile of Vioxx was sufficient to trigger "inquiry notice." *In re Merck*, 543 F.3d at 172. Specifically, the FDA criticized Merck's advocacy of the "Naproxen Hypothesis," which posited that the apparent increase in cardiovascular adverse events observed in patients taking Vioxx was attributable to the cardioprotective effects of naproxen rather than the harmful effects of Vioxx. According to the Third Circuit, the FDA warning letter was not sufficient

to constitute a "storm warning" because it did not suggest Merck's disbelief in the validity of the Naproxen Hypothesis. Rather, the Third Circuit held that evidence of Merck's disbelief in the Naproxen Hypothesis first surfaced in October 2003 when the Wall Street Journal reported that a study sponsored by Harvard University (the "Harvard Study") refuted the Naproxen Hypothesis. The Third Circuit concluded that plaintiffs' claims were not time-barred because they filed their complaint within months of the Harvard Study's publication.

Here, the February 2001 FDA Disclosures constitute "storm warnings" even if the Court concludes that "storm warnings" must consist of evidence that the defendant acted with scienter.

First, while Petitioners believe that the Third Circuit reached an incorrect conclusion in *Merck*, there can be no question that the February 2001 FDA Disclosures constitute "storm warnings" even under the Third Circuit's analysis in *Merck*. There is no principled difference between the revelations in the Harvard Study – which the Third Circuit held to be the disclosure that placed the *Merck* plaintiffs on notice of Merck's disbelief in the validity of the Naproxen Hypothesis – and the February 2001 FDA disclosures in the present action. In February 2001, the FDA disclosed on its website all the CLASS data, which contradicted Petitioners' earlier alleged misrepresentations about the CLASS results. Further, there was extensive public dissemination, through securities analysts and other media, of the FDA Advisory Committee's and FDA staff's refutation of Petitioners' Alternative Analysis (as defined in the Petition). Following the February 2001 FDA Disclosures, Pharmacia's stock price declined, according to

Respondents' expert, by a statistically significant amount. Pet. 9-10, 27. Thus, even under the Third Circuit's analysis in *Merck*, this information was sufficient to suggest that Petitioners did not believe the validity of the Alternative Analysis published in JAMA and, thereby, constituted "storm warnings" that triggered Respondents' "inquiry notice." In contrast, the Third Circuit's conclusion that "storm warnings" did not exist until the publication of the Washington Post article has no basis in fact, logic or the law and, indeed, is inconsistent with its analysis in *Merck*. As set forth in the Petition, nothing in that article addressed the veracity of Petitioners' belief in their prior statements about the results of CLASS. Moreover, the article itself was a belated discussion of the information revealed by the February 2001 FDA Disclosures and Pharmacia's stock price remained unchanged following the article's publication. Pet. 19-20.

Second, the February 2001 FDA Disclosures also constitute "storm warnings" under the approach advocated by the Solicitor General in her *amicus* brief in *Betz*. The Solicitor General expressed her view that notice of a defendant's scienter is a prerequisite to "inquiry notice" and identified circumstances under which information suggesting the falsity of a defendant's statements would suffice to put plaintiffs on notice of the defendant's scienter:

> To be sure, an innocent mistake may be inherently unlikely, so that information giving rise to a suspicion of falsehood will without more give rise to a suspicion of fraud. In particular, when a "representation is false for reasons likely to have been within the knowledge of the company when

> making it, investors upon learning of the falsity should smell the possibility of fraud."

Amicus Br. 11-12 (*quoting Law v. Medco Research, Inc.*, 113 F.3d 781, 785 (7th Cir. 1997)). Here, as even the Complaint alleges, the information underlying Petitioners' allegedly false representations was within Petitioners' knowledge. *See* JA:0249-51. Accordingly, under the Solicitor General's approach, the February 2001 FDA Disclosures constitute information suggesting Petitioners' scienter, and, therefore, were "storm warnings."

Because the February 2001 FDA Disclosures (which occurred over two years before Respondents filed their complaint) constitute "storm warnings" even if the Court requires evidence of scienter, the Petition presents the Court with a compelling opportunity to address the standard for determining when the limitations period begins to run in relation to the existence of "storm warnings." Specifically, certain circuits hold that a plaintiff is on "inquiry notice," thus triggering the limitations period, simply when the plaintiff becomes aware of facts constituting "storm warnings." Other circuits hold that the existence of "storm warnings" obligates a plaintiff to undertake a diligent investigation to ascertain its claims. If the plaintiff does not undertake a diligent investigation, the limitations period begins to run from the time the "storm warnings" occur. Still other circuits hold that the existence of "storm warnings" does not obligate a plaintiff to investigate, but that the limitations period runs when the plaintiff would have uncovered facts supporting a claim had it undertaken an investigation in response to the "storm warnings." Here, because Respondents undertook no investigation, their claims would be

time-barred under the first two approaches because their complaint was filed over two years from the February 2001 FDA Disclosures. Respondents' claims would be time-barred under the third approach, as well, because the February 2001 FDA Disclosures provided Respondents with the information forming the allegations set forth in their original complaints. Petitioners note, however, that no circuit adopting this third approach appears to have established any standard for determining its implementation. Accordingly, this case presents the Court with the opportunity to articulate the appropriate standard for determining when the limitations period commences in relation to "storm warnings," and, at the same time, to provide the necessary guidance as to its implementation.

The Petition presents additional issues that merit issuance of a writ of *certiorari*. Petitioners established that the Third Circuit's finding that the February 2001 FDA Disclosures were too complicated to put a "reasonable investor" on inquiry notice contradicts the fundamental premise of *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) – that all information about a security, which is traded in an efficient market, is incorporated into the price of that security. Indeed, in order to avail themselves of the fraud on the market presumption of reliance, Respondents alleged that all information about Pharmacia securities, including the highly technical allegedly false statements in the JAMA article, was incorporated into Pharmacia's stock price. Respondents cannot have it both ways. They cannot, on the one hand, claim that they were defrauded on the basis of a scientific publication as to which reliance is presumed under *Basic*, yet, on the other hand, contend that they were not on notice of scientific information

rebutting Petitioners' publication, which was widely disseminated in the market, because it was "too technical." Further, the Third Circuit's holding is irreconcilable with the undisputed facts that Pharmacia's stock price declined following the February 2001 FDA Disclosures, but did not decline following the Washington Post article. The Third Circuit's disregard of the negative stock price reaction to the February 2001 FDA Disclosures is inconsistent with established law and with the Third Circuit's express holding in *Merck* that a stock price decline is indicative of a "storm warning." 543 F.3d at 167, 171; *see* Pet. 26-28.

III. THE THIRD CIRCUIT'S OPINION DISREGARDED THE *TELLABS* MANDATE

Petitioners established that a writ of *certiorari* should be granted to address the Third Circuit's failure to follow the mandatory framework, established in *Tellabs*, by which courts must analyze a complaint's scienter allegations in connection with a Section 10(b) claim. In response, Respondents erroneously assert that the Third Circuit "in fact followed *Tellabs* explicitly" because the Third Circuit found that the complaint, "'[w]hen examined as a whole,' was 'replete with allegations [of] scienter.'" Resp. Br. 30-31 (*quoting* Pet. App. 19a). *Tellabs*, however, expressly requires a court to engage in a "comparative evaluation" by considering "not only inferences urged by the plaintiff . . . but also competing inferences [of nonfraudulent intent] rationally drawn from the facts alleged." 551 U.S. at 314. It is indisputable that the Third Circuit, like the District

Court, conducted no such evaluation.[2] The Third Circuit's failure to perform the analysis required by *Tellabs* merits the grant of a writ of *certiorari*. *See* Pet. 28-34.

IV. IF A WRIT OF *CERTIORARI* IS GRANTED IN THIS CASE, THE COURT SHOULD CONSOLIDATE IT WITH *MERCK* FOR ARGUMENT

Petitioners respectfully submit that the issues raised by the *Merck* petition would be addressed more completely by the Court's simultaneous consideration of the issues raised by the Petition in the present case. Accordingly, if the Court grants Petitioners' Petition for a writ of *certiorari*, Petitioners respectfully request that the Court consolidate the arguments for the present case and for *Merck* pursuant to Supreme Court Rule 27.3.

---

[2] For example, the Third Circuit found that (1) the February 2001 FDA Disclosures "only supported the view that there existed a legitimate dispute over scientific and statistical models," (2) "the transcript of the [FDA] Advisory Committee meeting explicitly supports a finding that the experts believed that the dispute between defendants and the FDA was a good faith, legitimate scientific dispute" and (3) "the Advisory Committee simply did not believe that anything untoward had occurred." Pet. App. 14a-15a, 17a. The Third Circuit refused, however, to assess the weight of these inferences of nonfraudulent intent against those urged by Respondents in evaluating the adequacy of Respondents' boilerplate scienter allegations. *See* Pet. 32-34.

CONCLUSION

For the reasons set forth above and in the Petition, Petitioners respectfully request that the Court grant Petitioners' Petition for a writ of *certiorari* and request for argument consolidation pursuant to Rule 27.3.

Respectfully submitted,

WILLIAM A. DREIER
STEVEN A. KARG
NORRIS, MCLAUGHLIN & MARCUS, P.A.
P.O. Box 1018
721 Route 202-206
Somerville, New Jersey 08876
(908) 722-0700

DENNIS J. BLOCK
Counsel of Record
JONATHAN M. HOFF
JOSHUA R. WEISS
CADWALADER, WICKERSHAM & TAFT LLP
One World Financial Center
New York, New York 10281
(212) 504-6000

Counsel for Petitioners

August 4, 2009